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THE INEVITABLE DISCOVERY DOCTRINE: INDIANA AS THE EXCEPTION, NOT THE RULE[†]

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.*¹

I. INTRODUCTION

It was June 8, 2001, and Amanda Concklin had just been reported missing by her grandmother.² The case was assigned to Officer Vaughn of the Memphis, Tennessee homicide bureau, whose investigation led to a witness by the name of Jason Keel. Keel informed Officer Vaughn that he had driven to the home of William Holland, where Amanda had stayed that weekend, and was told by Holland that Amanda was dead. Keel additionally reported that he observed Amanda's body in a room adjacent to the garage and that he saw Holland "stomp" on Amanda's remains, causing her body to make a gurgling sound.

Armed with this information and believing that evidence of Amanda's death was still present on Holland's property, Officer Vaughn applied for a search warrant. Within days, the search warrant was granted, authorizing law enforcement officers to search Holland's home and garage. On the day the warrant issued, however, Officer Vaughn responded to a bank robbery and murder which consumed the remainder of the day. The following day, Officer Vaughn's plan to execute the search warrant at Holland's home was again delayed as he was needed to assist with the interview of a suspect in the previous day's bank robbery. While conducting this interview, Officer Vaughn was informed that other officers uninvolved with his investigation of Holland had discovered a body at Holland's home.

Responding to an anonymous tip to the Crime Stoppers hotline that a woman's deceased body was wrapped in a camouflage sleeping bag in a vehicle parked in Holland's garage, two patrol officers drove to Holland's home to investigate. Neither officer was aware that Officer

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¹ IND. CONST. art. 1, § 11.

² The situation described below is based on actual events that occurred during the police investigation of William Holland as reported by the Honorable Diane Vescovo, United States Magistrate Judge for the United States District Court for the Western District of Tennessee in *United States v. Holland*, 2003 U.S. Dist. LEXIS 14090 (W.D. TN 2003).

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Vaughn was investigating Holland or that Officer Vaughn had previously obtained a search warrant for Holland's residence. While standing near Holland's garage, the two officers reported that they smelled an odor consistent with decomposing human remains. Believing that the tip to Crime Stoppers had been corroborated, the officers forced entry into the garage without first obtaining a search warrant.

Prior to trial, in a motion to suppress, Holland argued that the officers' search of his garage without a search warrant was constitutionally unreasonable under the Fourth and Fourteenth Amendments of the U.S. Constitution.³ His argument was sound and the district court agreed, finding that although the officers had probable cause to believe that a body may have been concealed in the garage, the officers' warrantless search of the garage was unconstitutional.

In light of the exclusionary rule, which the Supreme Court has held requires that all evidence obtained through police misconduct ordinarily must be suppressed in a subsequent criminal prosecution of the accused,⁴ it would seem that the misconduct of the two patrol officers should result in suppression of the evidence of the body that was discovered by the unlawful search of Holland's garage. Such a result, however, seems incredibly unjust in light of the fact that Officer Vaughn, armed with a validly issued search warrant and without any reference to the misconduct of the patrol officers, inevitably would have lawfully discovered the very same evidence. Although, in *United States v. Holland*, Officer Vaughn completely obeyed the mandates of the Fourth Amendment by obtaining a search warrant which he would have soon executed, the officers who actually conducted the search of the garage did not. In their haste to recover the body of a murder victim, they searched Holland's garage without judicial authorization to do so. Accordingly, application of the exclusionary rule to the misconduct of the two well-intentioned, but over-anxious, officers would require the suppression of the murder victim's body and all associated evidence obtained during the officers' unlawful search of the garage.

³ U.S. CONST. amend. IV. The Amendment provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁴ See *infra* notes 26–27 and accompanying text; see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (explaining that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

Consequently, of course, bringing Amanda's murderer to justice would prove extraordinarily difficult, if not impossible, for the prosecution.

As the facts illustrate, and as the United States Supreme Court has itself recognized, a blanket application of the exclusionary rule to *all* evidence unlawfully obtained by police, regardless of whether the police would inevitably have discovered the evidence, would inflict upon society a tremendous cost while at the same time do little to promote the purposes of the exclusionary rule.⁵ It is for this reason that the Supreme Court under the United States Constitution, and virtually every state court under its respective state constitution, has adopted some variation of the inevitable discovery doctrine.⁶ The Indiana Court of Appeals, however, has categorically rejected the inevitable discovery doctrine as a matter of Indiana constitutional law, without providing any significant justification for doing so.⁷

Under the United States Constitution, as interpreted by the Supreme Court, because Officer Vaughn would inevitably have discovered Amanda's body without reference to the police misconduct, the evidence would be admissible in Holland's trial.⁸ However, under the Indiana Constitution, as presently interpreted by the Indiana Court of Appeals, no cure would exist for the unconstitutional search of Holland's garage, despite the fact that Officer Vaughn would inevitably have conducted that very same search pursuant to a properly obtained search warrant,

⁵ See *infra* note 28 (recognizing not only the benefits but also the substantial costs of the exclusionary rule and that application of the rule has been restricted to those areas where its remedial objectives are likely most efficaciously served).

⁶ See *infra* note 37 and accompanying text; see also *Nix v. Williams*, 467 U.S. 431, 444 (1984) (explaining that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[] . . . [t]hen the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.") (internal footnote omitted). See also *infra* note 55 (observing that only Indiana and Texas appear to have expressly refused to recognize the inevitable discovery rule and finding that only three states appear to have never directly addressed the issue of the inevitable discovery rule).

⁷ See generally *infra* notes 74–81 and accompanying text (observing that the Indiana Court of Appeals, in one sweeping statement with no analysis of the varying forms in which the inevitable discovery exception might be adopted, rejected application of the exception under any circumstances).

⁸ See *infra* note 37 and accompanying text; see also *Nix v. Williams*, 467 U.S. 431, 444 (1984) (explaining that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[] . . . [t]hen the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.") (internal footnote omitted).

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and Holland would undoubtedly avoid a conviction for the murder of Amanda Concklin.⁹

The purpose of this Note is to illustrate the need for the Indiana Supreme Court to adopt the inevitable discovery doctrine as a constitutional exception to the exclusionary rule under the Indiana Constitution and to provide a logical formulation of the doctrine for Indiana courts to follow. Additionally, this Note is intended to encourage Indiana's prosecuting attorneys and the Indiana Attorney General's Office to continue to raise the inevitable discovery doctrine in future cases until such time as the Supreme Court of Indiana conclusively resolves whether the inevitable discovery doctrine is consistent with Article 1, Section 11 of the Indiana Constitution. Part II.A of this Note discusses the inevitable discovery exception as adopted by the United States Supreme Court.¹⁰ Part II.B discusses some of the diverging opinions of legal commentators on the strengths and weaknesses of the inevitable discovery exception as adopted by the United States Supreme Court.¹¹ Part II.C discusses the various formulations of the inevitable discovery doctrine adopted by the states.¹² Part III analyzes the strengths and weaknesses of the various formulations of the inevitable discovery exception.¹³ Finally, Part IV proposes the adoption of a formulation of the inevitable discovery exception that, within the confines of Article 1, Section 11 of the Indiana Constitution, furthers the purposes of the exclusionary rule while, at the same time, does not overlook the enormous cost inflicted upon society by the exclusion of evidence of unquestioned truth.¹⁴

II. BACKGROUND: THE MANY FACES OF THE INEVITABLE DISCOVERY EXCEPTION

The United States Supreme Court has long recognized the exclusionary rule, which generally renders inadmissible in a criminal

⁹ See *infra* notes 78–79 and accompanying text (interpreting a single statement of the Indiana Supreme Court as forever foreclosing the availability of the inevitable discovery exception in any form under any circumstances as a matter of Indiana constitutional law).

¹⁰ See *infra* Part II.A (discussing the basic framework adopted by the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984), for application in inevitable discovery cases).

¹¹ See *infra* Part II.B (discussing the many varying opinions of legal commentators as to the wisdom of the Supreme Court's opinion in *Nix v. Williams*, 467 U.S. 431 (1984)).

¹² See *infra* Part II.C (discussing many of the differing formulations of the inevitable discovery exception adopted by various state courts).

¹³ See *infra* Part III (discussing the most frequently debated strengths and weaknesses of the varying formulations of the inevitable discovery exception).

¹⁴ See *infra* Part IV (proposing a formulation of the inevitable discovery exception to be applied by Indiana courts in inevitable discovery cases).

trial any evidence obtained by the government as a result of police misconduct.¹⁵ Throughout its history, however, many exceptions to the exclusionary rule have developed.¹⁶ One such exception is the inevitable discovery doctrine.¹⁷ Part II.A discusses the inevitable discovery exception as it was adopted by the United States Supreme Court.¹⁸ Part II.B discusses some of the many opinions of legal commentators on the strengths and weaknesses of the inevitable discovery exception as adopted by the United States Supreme Court.¹⁹ Part II.C discusses the various formulations of the inevitable discovery doctrine adopted by the states.²⁰

In order to more thoroughly explore the inevitable discovery doctrine, a brief discussion of the reasons for, and development of, the exclusionary rule is appropriate.²¹ The charge and effect of the Fourth Amendment of the United State Constitution is to restrain

the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law.²²

¹⁵ See *infra* notes 26–27; see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (explaining that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court[.]”).

¹⁶ See *infra* note 31 (recognizing that the warrant requirement has become so riddled with exceptions as to render it basically unrecognizable).

¹⁷ See *infra* note 37 and accompanying text; see also *Nix v. Williams*, 467 U.S. 431, 444 (1984) (explaining that “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[] . . . [t]hen the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.”) (internal footnote omitted).

¹⁸ See *infra* Part II.A (discussing the basic framework adopted by the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984), for application in inevitable discovery cases).

¹⁹ See *infra* Part II.B (discussing the many varying opinions of legal commentators as to the wisdom of the Supreme Court’s opinion in *Nix v. Williams*, 467 U.S. 431 (1984)).

²⁰ See *infra* Part II.C (discussing many of the differing formulations of the inevitable discovery exception adopted by various state courts).

²¹ See generally *infra* notes 21–31 and accompanying text (discussing the development of, and justifications for, the exclusionary rule under the United States Constitution).

²² *Weeks v. United States*, 232 U.S. 383, 392, 391–92 (1914). In *Weeks*, police officers had gone to Weeks’s house and, after being told by a neighbor where Weeks kept a key to the house, found the key and entered the house. *Id.* at 386. The police then searched Weeks’s room and took possession of various papers and articles found there, which were

In *Weeks v. United States*, the Court adopted the exclusionary rule as a necessary tool to ensure that Constitutional prohibitions are respected and that Constitutional rights are protected.²³ Since *Weeks*, the Court has recognized that the exclusionary rule serves the following two dominant functions: (1) deterring lawless conduct by federal officers and (2) closing the doors of the federal courts to the use of evidence obtained unconstitutionally.²⁴ Initially, in *Wolf v. Colorado*, the Court determined that the exclusionary rule applied only when an illegal search or seizure was perpetrated by the federal government.²⁵ However, in *Mapp v. Ohio*,²⁶ the Court overruled its prior decision in *Wolf*, and held that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”²⁷

afterward turned over to the United States Marshal. *Id.* Later in the same day police officers returned with the Marshal, who thought he might find additional evidence. *Id.* After being admitted by someone in the house, the Marshal searched Weeks’s room and carried away certain letters and envelopes found in the drawer of a chiffonier. *Id.* Neither the Marshal nor the police officers had obtained a search warrant prior to entering and searching Weeks’s home. *Id.*

²³ *Id.* at 394 (noting that “the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction[]” and holding that “[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action”).

²⁴ See, e.g., *Brown v. Illinois*, 422 U.S. 590, 599 (1975); see also, *Figert v. State*, 686 N.E.2d 827, 833 (Ind. 1997) (citing *United States v. Leon*, 468 U.S. 897, 916 (1984)). In *Figert*, the Indiana Supreme Court accepted that “the exclusionary rule is designed to deter police misconduct. . . .” *Id.*

(quotation marks omitted).

²⁵ See 338 U.S. 25, 33 (1949) (holding, without ever discussing the facts of the case, “in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure[]”).

²⁶ 367 U.S. 643 (1961).

²⁷ *Id.* at 655. In *Mapp*, police officers sought entrance to Ms. Mapp’s home and, when Ms. Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. *Id.* at 644. Thereafter, the Court described in detail the disturbing conduct of the police that followed:

Meanwhile, Miss Mapp’s attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the “warrant” and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been “belligerent”

Although the deterrent purpose of the exclusionary rule is broad, the Court has often observed that the exclusionary rule has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.²⁸ Moreover, the Court has repeatedly emphasized that the use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.²⁹ Since the Court's adoption of the exclusionary rule in 1914, the Court has

in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home."

Id. at 644-45.

²⁸ See *United States v. Ceccolini*, 435 U.S. 268, 275 (1978) (recognizing not only the benefits but also the substantial costs of the exclusionary rule and that application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served).

²⁹ See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). The Court observed that a Fourth Amendment violation is "fully accomplished" by an illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can cure the invasion of the defendant's rights which he has already suffered. *Id.* Accordingly, the Court has reiterated that "the exclusionary rule is instead a judicially created means of deterring illegal searches and seizures[]" and has held that, because the rule is prudential rather than constitutionally mandated, it is applicable only where its deterrence benefits outweigh its substantial social costs. *Id.* at 363 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

carved out numerous exceptions to the rule.³⁰ One such exception to the exclusionary rule is the inevitable discovery doctrine.³¹

³⁰ See *James v. Illinois*, 493 U.S. 307, 311 (1990) (allowing exceptions where the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a speculative possibility). See also *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring). Justice Scalia recognized that the warrant requirement has become so riddled with exceptions as to render it basically unrecognizable. *Id.* Justice Scalia further observed that in 1985, one commentator had catalogued nearly twenty such exceptions and that, since then, the Court had added two more. *Id.* (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985)).

³¹ See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (holding that “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[] . . . [t]hen the deterrence rationale has so little basis that the evidence should be received”) (internal footnote omitted). In *Nix*, Williams was a suspect in the kidnapping of 10-year-old Pamela Powers, who had disappeared from a YMCA building in Des Moines, Iowa. *Id.* at 434. Shortly after Pamela disappeared, Williams had been observed leaving the YMCA carrying a large bundle wrapped in a blanket, and a 14-year-old boy reported that, while helping Williams open his car door, he had seen “two legs in [the bundle] and they were skinny and white.” *Id.* The next day, authorities located Williams’ car 160 miles east of Des Moines in Davenport, Iowa, and police also discovered several items of clothing belonging to the child, some of Williams’ clothing, and an army blanket like the one Williams used to carry the bundle out of the YMCA, at a rest stop on Interstate 80 near Grinnell, between Des Moines and Davenport. *Id.* at 434–35. Based on this information, a warrant was issued for Williams’ arrest. *Id.* at 435. Believing that Williams may have left Pamela Powers or her body somewhere between Des Moines and the Grinnell rest stop where some of Pamela’s clothing was found, the Iowa Bureau of Criminal Investigation initiated a large scale search. *Id.* Approximately two hundred volunteers divided into teams and began searching the 21-mile area east of Grinnell, covering several miles north and south of Interstate 80. *Id.* The search teams were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which Pamela’s body could be hidden. *Id.* As the massive search effort progressed, Williams surrendered to authorities in Davenport and was promptly arraigned. *Id.* Williams contacted an attorney in Des Moines, who arranged for a Davenport attorney to meet Williams at the Davenport police station. *Id.* Des Moines detectives, who had made arrangements to transport Williams from Davenport to Des Moines, assured Williams’ counsel that they would not question Williams during the return trip to Des Moines. *Id.* During that trip, however, one of the detectives began a conversation with Williams, saying:

I want to give you something to think about while we’re traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. . . . [A]fter a snow storm [we may not be] able to find it at all.

A. The Inevitable Discovery Exception and the United States Constitution

In *Nix v. Williams*, the Court expressly held that logic, experience, and common sense necessitated the adoption of the inevitable discovery doctrine as a logical exception to the exclusionary rule.³² The precise issue before the Court in *Nix* was whether evidence pertaining to the discovery and condition of a murder victim's body, obtained through improper questioning by a detective in violation of the defendant's Sixth Amendment rights, could properly be admitted on the ground that the body would inevitably have been discovered, even if no violation of any constitutional or statutory provision had taken place.³³

Id. at 435–36 (quotation marks omitted). After telling Williams that he knew that the body was in the area of Mitchellville which was a town they would be passing on the way to Des Moines, the detective concluded the conversation by saying: “I do not want you to answer me. . . . Just think about it. . . .” *Id.* at 436. Later, as they approached Mitchellville, Williams agreed to lead the officers to Pamela's body. *Id.* Upon learning that Williams had agreed to lead authorities to Pamela's body, the officers in charge of the search effort called off the search. *Id.* At the time the search ended, one search team was only two and one-half miles from where Williams soon led the detectives to Pamela's body. *Id.* Pamela's body was found next to a culvert in a ditch beside a gravel road about two miles south of Interstate 80, essentially within the area to be searched. *Id.*

³² See 467 U.S. 431, 444 (1984) (holding, “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[] . . . [t]hen the deterrence rationale has so little basis that the evidence should be received.”) (internal footnote omitted).

³³ *Id.* at 434. Prior to Williams' trial for the first-degree murder of ten year-old Pamela Powers, his counsel moved to suppress evidence of Pamela's body and all related evidence, including the condition of her body, stating that it was the “fruit” or product of an unlawful interrogation in violation of Williams' Sixth Amendment right to the assistance of counsel. *Id.* at 436–37. In the Court's earlier decision in *Brewer v. Williams*, 430 U.S. 387 (1977), the Court held that the detective, through his “Christian burial speech,” had obtained incriminating statements from Williams through what was viewed as an interrogation in violation of Williams' Sixth Amendment right to counsel. *Id.* at 400–01 (affirming the decision of the United States Court of Appeals for the Eighth Circuit in *Williams v. Brewer*, 509 F.2d 227, 234 (1974), which affirmed the decision of the United States District Court for the Southern District of Iowa in *Williams v. Brewer*, 375 F. Supp. 170, 186 (1974), granting Williams' petition for a writ of habeas corpus).

At Williams' trial, prosecutors did not offer Williams' statements into evidence, nor did prosecutors offer evidence that Williams had led authorities to Pamela's body. *Nix*, 467 U.S. at 437. Rather, the prosecution only admitted evidence of the condition of the body as it was found, articles and photographs of her clothing, and post-mortem medical and chemical tests on the body. *Id.* After trial, the jury again convicted Williams of first-degree murder and he was sentenced to life in prison. *Id.* In deciding to admit the evidence derived from the discovery of Pamela's body, the trial court ruled:

[T]he State had proved by a preponderance of the evidence that, if the search had not been suspended and Williams had not led the police to the victim, her body would have been discovered “within a short time” in essentially the same condition as it was actually found.

Id. at 437–38. The trial court then concluded:

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The Court commenced its analysis of the inevitable discovery doctrine by noting as follows: “the ‘vast majority’ of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule.”³⁴ Recognizing the functional similarity between the independent source exception to the exclusionary rule and the inevitable discovery doctrine, the Court concluded that the rationale underlying the independent source exception was wholly consistent with, and justified the Court’s adoption of, the inevitable discovery doctrine as an exception to the exclusionary rule.³⁵ Additionally, throughout its opinion in *Nix*, the Court emphasized that, although the prosecution is not to be put in a better position than it would have been in if no illegality had transpired, this “derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct.”³⁶

[I]f the police had not located the body, the search would clearly have been taken up again where it left off, given the extreme circumstances of this case and the body would [have] been found *in short order*.

Id. at 438 (quotation marks omitted). On appeal, the Eighth Circuit reversed the district court’s denial of Williams’s petition for a writ of habeas corpus, and the Supreme Court granted the State’s petition for certiorari. *Id.* at 440.

³⁴ *Id.* In fact, at the time of the Court’s decision in *Nix v. Williams*, every federal court of appeals having jurisdiction over criminal matters had endorsed the inevitable discovery exception. *Id.* at 441 n.2. In *Nix v. Williams*, the Eighth Circuit likewise assumed that there was an inevitable discovery exception to the exclusionary rule to be applied in instances where the police would have discovered the evidence without the constitutional violation, but held that the State had not satisfied its burden of proof on a second requirement of the inevitable discovery exception—the requirement that the police had not acted in bad faith. *Id.* at 440.

³⁵ *Id.* at 443–44. Looking to precedent, the Court noted that in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), it held that the exclusionary rule applies both to illegally obtained evidence as well as to other incriminating evidence derived from the primary evidence, and that “[i]f knowledge of [such facts] is gained from an *independent source*, they may be proved like any others. . . .” *Nix*, 467 U.S. at 441 (citing *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920)). The Court further noted that, in *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963), it had previously held:

We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light *but for the illegal actions* of the police. Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’

Nix, 467 U.S. at 442.

³⁶ *Id.* at 443. The Court, observing that “[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation[.]” explained:

The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having

Having expressly adopted the inevitable discovery exception, the Court next determined that, in order for the inevitable discovery exception to apply, the prosecution must show by a preponderance of the evidence only that the challenged evidence inevitably would have been discovered by lawful means.³⁷ Rejecting the argument proffered by Williams, that the correct standard should be that of clear and convincing evidence, the Court distinguished the inevitable discovery doctrine from the cases in which the court has required clear and convincing evidence.³⁸

Finally, the Court rejected the decision by the court of appeals that the inevitable discovery doctrine should be available only in cases where the prosecution can prove the absence of bad faith.³⁹ The Court

juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than that they would have been in if no police error or misconduct had occurred.

Id. (citing *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964); *Kastigar v. United States*, 406 U.S. 441, 457-59 (1972)). The Court further recognized that its failure to adopt the inevitable discovery exception would disregard the balance of the interest in deterring police misconduct and the interest in making available to juries all probative evidence of a crime. *Nix*, 467 U.S. at 444. As the Court explained, "exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place." *Id.*

³⁷ *Id.* at 444 & n.5. In an oft-quoted statement, the Court explained:

If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

Id. (internal footnote omitted) (citing *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974), in which the Court held: "the controlling burden of proof at suppression hearings should impose *no greater burden* than proof by a preponderance of the evidence[]"). Adopting this same burden for use in cases in which the State is seeking application of the inevitable discovery exception, the Court explained, "[w]e are unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries." *Nix*, 467 U.S. at 444 n.5.

³⁸ *Id.* (citing *United States v. Wade*, 388 U.S. 218 (1967) (requiring clear and convincing evidence of an independent source for an in-court identification, recognizing the effect an uncounseled pretrial identification has in crystallizing the witnesses' identification of the defendant for future reference and the difficulty of determining whether an in-court identification was based on independent recollection unaided by the lineup identification)). The Court further reasoned that the heightened standard of clear and convincing evidence was unnecessary in inevitable discovery cases because "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." *Nix*, 467 U.S. at 444 n.5.

³⁹ *See id.* at 445-48. The Court further reasoned in part that its decision, in *Wong Sun*, "pointedly negated the kind of good-faith requirement advanced by the Court of Appeals in reversing the District Court." *Nix*, 467 U.S. at 442. In *Wong Sun*, the Court extended the

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explained, “[t]he requirement that the prosecution must prove the absence of bad faith[] . . . would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity[]” and that the police would then be placed in a worse position than if no unlawful conduct had occurred.⁴⁰

In *Nix*, the Court expressly held that “the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.”⁴¹ In addition, the Court found that “[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.”⁴² Thus, the Court held: “when, as here, the evidence in question

reach of the exclusionary rule to include evidence that was the indirect “fruit” of unlawful police conduct, but the Court again emphasized that evidence that has been illegally obtained need not always be suppressed. See *Wong Sun*, 371 U.S. 471, 487–88 (1963).

⁴⁰ *Nix*, 467 U.S. at 445. The Court also rejected the reasoning of the court of appeals that “if an absence-of-bad-faith requirement were not imposed, ‘the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the Exclusionary Rule reduced too far.’” *Id.* (quoting *Williams v. Nix*, 467 F.2d, at 1169 n.5). The Court reasoned that “[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.” *Id.* (citation omitted). Instead, contrary to the argument of the court of appeals, the Court determined that if a police officer is aware that evidence will inevitably be discovered, he will try to avoid engaging in questionable practices because “there will be little to gain from taking any dubious ‘shortcuts’ to obtain the evidence.” *Id.* at 446.

⁴¹ *Id.* at 446. Moreover, recognizing that requiring the prosecution to prove the absence of bad faith would at times require the exclusion of evidence that would have inevitably been discovered without any reference to illegal conduct, the Court observed that such a result “wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice[]” and that “[n]othing in this Court’s prior holdings supports any such formalistic, pointless, and punitive approach.” *Id.* at 445. The Court found additional support for its adoption of the inevitable discovery exception in Judge, later Justice, Cardozo’s observation that under the exclusionary rule, “[t]he criminal is to go free because the constable has blundered.” *Id.* at 447 (quoting *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926)). The Court noted that Judge Cardozo prophetically considered how far-reaching the societal effect of the exclusionary rule would be when “[the] pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious.” *Nix*, 467 U.S. at 447–48 (quotation marks omitted) (quoting *Defore*, 242 N.Y. at 23, 150 N.E. at 588). Even more prophetically, Judge Cardozo speculated that some day, “some court might press the exclusionary rule to the outer limits of its logic—or beyond—and suppress evidence relating to the ‘body of a murdered’ victim because of the means by which it was found.” *Nix*, 467 U.S. at 448 (citing *Defore*, 242 N.Y. at 23–24, 150 N.E. at 588).

⁴² *Nix*, 467 U.S. at 446. Recognizing that no one could seriously question the reliability of Pamela’s body as evidence, the Court explained that “[s]uppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.” *Id.* at 447. The Court further noted that exclusion of this evidence would do nothing to ensure

would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible.”⁴³

In a concurring opinion, Justice Stevens wrote to emphasize the gravity of the constitutional violation perpetrated by the detectives in questioning Williams without the presence of counsel; nevertheless, Justice Stevens agreed with the majority’s adoption of the inevitable discovery exception and the majority’s rejection of a good faith requirement.⁴⁴

Justice Brennan, in a dissenting opinion joined by Justice Marshall, also agreed with the majority that the inevitable discovery exception to the exclusionary rule is consistent with the requirements of the

the fairness of the criminal trial, reasoning that fairness can be ensured merely “by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place.” *Id.* Consequently, the Court determined:

[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted, regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct.

Id.

⁴³ *Id.* at 448. Applying the inevitable discovery doctrine to the facts in *Nix* and reversing the Eighth Circuit Court of Appeals, the Court explained,

“[o]n this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led police to the body and the body inevitably would have been found.”

Id. at 449–50.

⁴⁴ *Id.* at 451–57. In rejecting a requirement of proof of the absence of any bad faith on the part of the offending officer, Justice Stevens explained:

Admission of the victim’s body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of [the detective]. . . is therefore simply irrelevant. If the trial process was not tainted as a result of his conduct, this defendant received the type of trial that the *Sixth Amendment* envisions.

Id. at 456 (emphasis added) (citations omitted). Justice Stevens further rejected the opinion of the court of appeals that, without a good faith requirement, the inevitable discovery doctrine would encourage police misconduct, reasoning instead that “[w]hen the burden of proof on the inevitable discovery question is placed on the prosecution, it must bear the risk of error in the determination made necessary by its constitutional violation.” *Id.* (citation omitted)

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Constitution; however, Justice Brennan argued that the State should be required to satisfy the more onerous burden of proving by clear and convincing evidence that the evidence truly would have been discovered by lawful means and without reference to the illegality.⁴⁵ It is on this issue, concerning the proper standard of proof in inevitable discovery cases, that the Court's opinion in *Nix* has received its most fierce criticism.⁴⁶

B. The Inevitable Discovery Exception and the Opinions of Legal Commentators

Almost immediately after the Court's decision in *Nix*, legal commentators began publishing articles analyzing and criticizing the form of the inevitable discovery exception adopted by the Court in *Nix*.⁴⁷ Although these articles illustrate the varying opinions regarding the inevitable discovery exception, the arguments of critics of the inevitable discovery rule most frequently "are directed not so much to the rule itself as to its application in a loose and unthinking fashion."⁴⁸ One such commentator concluded that the inevitable discovery exception will be a valuable, but easily abused, exception to the exclusionary rule in light of the low standard of proof adopted by the Court in *Nix*.⁴⁹ Another

⁴⁵ *Id.* at 460 (reasoning that increasing the burden of proof to that of clear and convincing evidence "serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted[]"); see also *infra* notes 93–109 (providing similar arguments in support of a requirement of proof by clear and convincing evidence that the State would inevitably have obtained the challenged evidence by lawful means).

⁴⁶ See generally *infra* Part II.B (discussing the varying opinions of legal commentators with respect to the Court's opinion in *Nix v. Williams*).

⁴⁷ See generally *supra* notes 48–54 (providing examples of legal commentators criticizing various aspects of the Court's decision in *Nix v. Williams*).

⁴⁸ See 5 WAYNE R. LAFAVE, SEARCH & SEIZURE 11.4, at 243–44 (3d ed. 1996) (suggesting that courts must take care to ensure that the inevitable discovery exception is only applied in appropriate cases).

⁴⁹ See William M. Cohn, *Supreme Court Review: Sixth Amendment – Inevitable Discovery: A Valuable but Easily Abused Exception to the Exclusionary Rule*: *Nix v. Williams*, 104 S. Ct. 2501 (1984), 75 J. CRIM. L. & CRIMINOLOGY 729 (1984). Cohn agreed with the premise of the inevitable discovery exception that the illegality is not the cause of discovery at all, reasoning that conduct is not a legal cause of an event if the event would have occurred without the illegality. *Id.* at 746. Cohn, however, disagreed with the Court's decision regarding the applicability of the inevitable discovery exception to the facts in *Nix*. *Id.* at 751. Cohn argued that "[i]n any case in which the inevitable discovery rule is applicable, the court must examine thoroughly the facts of the case before the rule is introduced, in order to determine if the evidence indeed would have been discovered regardless of the police[] misconduct." *Id.* at 750. Cohn further argued, "[a] spotty and imprecise treatment of the facts, such as that undertaken by the Court in [*Nix*], leads to a mechanical application of the rule and detracts from the logic that determines its validity." *Id.* Determining that,

commentator, with similar sentiments, argued that the Court correctly adopted the inevitable discovery exception, but that it more wisely should have adopted a clear and convincing standard of proof.⁵⁰ Yet another commentator strongly condemned the Court's adoption of the proof by a preponderance of the evidence standard as evidence of the Court's determination "to utilize any theory or any vehicle which would enable Williams' conviction to stand[]" and as demonstrating "an inability to divorce itself from the evidence of a defendant's perceived guilt in order to unemotionally decide the validity of his constitutional claims."⁵¹

contrary to the Court's conclusion, the record in *Nix* did not show clearly that the body would inevitably have been found, Cohn essentially accused the Court of settling for a lesser standard of proof in light of the brutality of the crime. *Id.* Rejecting the Court's acceptance of proof by a preponderance as the appropriate standard in inevitable discovery cases, Cohn agreed with the dissent in *Nix* that "[r]equiring the prosecution to present clear and convincing evidence of inevitable discovery before concluding that the prosecution has met its burden of proof would deter judicial abuse of a valuable exception to the exclusionary rule and would protect the fundamental rights that the rule guarantees." *Id.* at 752. Concluding that "the integrity of the inevitable discovery doctrine demands that courts apply the rule in a consistent and neutral fashion, regardless of the facts of a case[.]" Cohn argued that "[w]hen a court permits the degree of a crime to dictate the requisite burden of proof, as the Supreme Court did in [*Nix*], the court strips the inevitable discovery doctrine of its strength and severely undermines the doctrine's value as an exception to the exclusionary rule." *Id.* at 752-53.

⁵⁰ See James Andrew Fishkin, *Nix v. Williams, An Analysis of the Preponderance Standard for the Inevitable Discovery Exception*, 70 IOWA L. REV. 1369, 1383 (1985) (arguing that a standard of clear and convincing proof is appropriate in inevitable discovery cases for three reasons: (1) the lower deterrent value of the preponderance of the evidence standard results in a greater likelihood of police violations of constitutional rights; (2) the inherently speculative nature of the inevitable discovery exception increases the risk of admitting evidence that might never have otherwise been discovered through legal means; and (3) the defendant's interest in not having admitted against him evidence obtained as a result of unlawful police conduct, outweigh the government's interest in applying the lower standard of proof by a preponderance of the evidence).

⁵¹ See Leslie-Ann Marshall Shelby Webb, Jr., Note, *Constitutional Law – The Burger Court's Warm Embrace of an Impermissibly Designed Interference with the Sixth Amendment Right to the Assistance of Counsel – The Adoption of the Inevitable Discovery Exception to the Exclusionary Rule: Nix v. Williams*, 28 HOWARD L. J. 945, 988 (1985). While not rejecting the inevitable discovery exception in all cases, Webb strongly advocated for an increased clear and convincing standard of proof, reasoning that, without the heightened burden of proof, "the officer is better off acting illegally whenever the legal investigation's chances are better than fifty percent, since the better-than-fifty-percent chance will lead to a finding of inevitable discovery." *Id.* at 990. Moreover, Webb argued that the Court's adoption of a lesser standard of proof amounted to an encouragement of constitutional violations by police, and that "Chief Justice Burger has openly condoned as well as encouraged. . . [Sixth Amendment violations]—so much so, in our opinion, as to elevate the high court from the status of a mere 'accomplice' to one of 'co-conspirator' to such illegal activity." *Id.* at 1003. Finally, Webb concluded that "[t]he Supreme Court's warm embrace of such an

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While much of the criticism directed at the Court was specifically aimed at the low standard of proof required by the Court in *Nix*, many commentators were also concerned with the lack of any requirement of good faith on the part of the police who engaged in the misconduct at issue.⁵² On the contrary, others have regarded the Court's rejection of any requirement of good faith as remaining true to the logic underlying the inevitable discovery doctrine.⁵³

Although the articles described above have in large part debated the wisdom of aspects of the inevitable discovery exception already addressed by the United States Supreme Court, many other important aspects of the inevitable discovery exception remain unsettled as a matter of federal constitutional law, resulting in circuit splits among the federal circuits regarding the precise contours of the inevitable discovery exception.⁵⁴ Although the United States Supreme Court has not yet

impermissibly designed interference with [S]ixth [A]mendment rights is an abomination to the integrity of our judicial system." *Id.*

⁵² See Robert K. Hendrix, *The Inevitable Discovery Exception to the Exclusionary Rule: Nix v. Williams*, 104 S. Ct. 2501 (1984), 54 U. CIN. L. REV. 1087 (1986) (arguing that the lack of any requirement of good faith and the lower standard of proof of a preponderance of the evidence would encourage police to engage in illegal conduct during police investigations). Hendrix argued that, realistically, the Court's refusal to include a lack of bad faith requirement will allow police purposely to violate defendants' rights in the interest of accelerating investigations and would work as an open invitation to illegal action. *Id.* at 1096. Hendrix continued, "[t]he harm to civil rights resulting from the temptation to take shortcuts more than outweighs the societal cost of excluding probative evidence under a lack of bad faith rule[]" and, furthermore, Hendrix argued that "society has a high interest in forcing its government to obey its own laws." *Id.* With respect to the standard of proof by a preponderance, Hendrix argued that "[i]n a situation where a police officer can be reasonably sure that evidence will be discovered inevitably, the officer will not be deterred by the risk of exclusion because he believes that there is ample evidence to prove inevitable discovery by a preponderance of evidence." *Id.* at 1097. Accordingly, Hendrix believed that "the Court's holding in *Nix* may serve as an incentive to take procedural shortcuts in the interest of saving time and effort." *Id.*

⁵³ See Cohn, *supra* note 49, at 749 (agreeing with the Court's rejection in *Nix* of a good faith requirement as "pointless" and "punitive," reasoning that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence and that it makes no sense to invoke a good or bad faith test because the mens rea of the offending officer is irrelevant to the question of causation). In addition, Cohn argued that "a 'good faith' test would force society to pay for the mistakes of its law enforcement officials; because of police infractions, courts would exclude evidence that would have been discovered through lawful means, and potentially dangerous criminals would escape conviction with impunity." *Id.* at 750.

⁵⁴ See Troy E. Golden, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. PUB. L. 97, 125 (1998) (observing that the federal circuits have split in three major areas: (1) whether the inevitable discovery exception applies only to derivative evidence (evidence that is an unknown indirect future byproduct derived from the misconduct that inevitably would have been obtained through legal means) or if it also reaches primary evidence

answered the questions that are creating this discord within the federal circuits, the fact remains that its answer will not necessarily resolve the debate. Rather, the Court's answer will only determine the scope of the inevitable discovery exception under the federal Constitution; each state must independently resolve for itself the various issues when determining the formulation of the inevitable discovery exception that is appropriate under its respective state constitution.

C. The Inevitable Discovery Exception and Its Treatment by the States

Since the Court's adoption of the inevitable discovery exception to the exclusionary rule, virtually every state court to consider the issue has adopted the exception under its respective state constitution.⁵⁵ However, the guidelines for applying the inevitable discovery doctrine in those states are by no means uniform.⁵⁶ In fact, the Court's decision in *Nix* has

(evidence immediately known and actually obtained directly after the misconduct); (2) whether the police may simply rely on the "we could have gotten a warrant excuse" as proof that the evidence would have inevitably been discovered or whether the choice to disregard the warrant requirement eliminates the applicability of the exception; and (3) whether the inevitable discovery exception requires a demonstration that the lawful means that made the discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct). Golden argues that the United States Supreme Court should reject the majority rule and hold that the inevitable discovery exception does not reach primary evidence, and instead confine the reach of the inevitable discovery exception to derivative evidence only, or, in the alternative, limit the exception to cases in which the prosecution has demonstrated that police were actively pursuing lawful means of obtaining the evidence. The court reasoned that to adopt an expansive approach to the inevitable discovery exception would have the effect of encouraging police misconduct in violation of the basic principles underlying the Fourth Amendment. *See id.* at 126. *See also* Jessica Forbes, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 *FORDHAM L. REV.* 1221, 1238 (1987) (arguing that the inevitable discovery rule already is overboard and that applying it to primary evidence which is a direct product of the police illegality would completely undermine the deterrent effect of the exclusionary rule. *But see* Stephen E. Hessler, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 *MICH L. REV.* 238, 278 (2000) (arguing against the adoption of the active pursuit doctrine as an unsupported extension of the Court's holding in *Nix* that operates as a formalistic "'bright-line' rule ill equipped to address the multiple fact patterns that implicate the Fourth Amendment exclusionary rule[.]" and arguing in favor of the adoption of an "independent circumstances test" that would establish inevitability in the absence of active pursuit).

⁵⁵ *See State v. Flippo*, 575 S.E.2d 170, 188 n.23 (W.Va. 2002) (observing that "[o]nly [Indiana and Texas] appear to have expressly refused to recognize the inevitable discovery rule[.]" and finding "only three states, South Carolina, Vermont, and Wyoming, that appear never to have directly addressed the issue of the inevitable discovery rule[.]").

⁵⁶ *Id.* at 188 (observing, "[i]t has been suggested that '[i]n carving out the 'inevitable discovery' exception . . . courts must use a surgeon's scalpel and not a meat axe[.]'" (citing *LAFAVE, supra* note 48, at 244); however, "[a] review of judicial opinions reveal that federal and state courts have used a 'scalpel' and a 'meat axe' in carving out guidelines for the

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itself been the focus of a fair amount of criticism.⁵⁷ For instance, in *Smith v. State*,⁵⁸ the Supreme Court of Alaska, considering whether to adopt the inevitable discovery doctrine under the Alaska Constitution, noted that various scholars, including Professor Wayne R. LaFave, disagree concerning the advisability of the inevitable discovery rule.⁵⁹ Despite the

inevitable discovery rule[.]” and that “there is a split of authority among federal and state courts on the requirements for establishing the inevitable discovery rule[.]”.

⁵⁷ See Jason Liljestrom, *Lawful to the World: Protecting the Integrity of the Inevitable Discovery Doctrine*, 58 HASTINGS L. J. 177, 184 (2006). Liljestrom observed that

[s]ince its adoption in *Nix*, the inevitable discovery doctrine has been the subject of a fair amount of criticism. For example, some argue that the relatively low preponderance standard is inappropriate because the doctrine necessarily relies on a hypothetical reconstruction of the facts. The Court's explicit rejection of a good faith requirement has also raised concerns among legal commentators. In addition to doctrinal criticism, *Nix* left several questions open for interpretation, leading to circuit splits in application. For instance, the so-called ‘primary/derivative evidence distinction’ arose because it is unclear if the *Nix* Court meant to restrict the application of the exception to derivative evidence only. Additionally, lower courts are split on whether the existence of an active search for the victim in *Nix* was a critical prerequisite (the ‘active pursuit’ requirement). Despite the ongoing criticism and division regarding application of the various nuances of the inevitable discovery doctrine, the requirement that the hypothetical independent source be lawful is one element that appeared quite straightforward. After all, the *Nix* Court unequivocally mandated that the prosecution rely on ‘lawful means.’ Nevertheless, a pair of recent cases has created yet another inter-circuit conflict, and has thrust the lawful means requirement to the forefront of the inevitable discovery debate.

Id. at 183–84 (footnotes omitted).

⁵⁸ 948 P.2d 473 (Alaska 1997).

⁵⁹ *Id.* at 478–79. Professor LaFave has summarized the various views as follows:

On the one hand, it is said that it “is a valuable, logical and constitutional principle,” the continued application of which will not “emasculate or blunt the force of the exclusionary rule.” So the argument goes, the “inevitable discovery” test, “if properly administered, serves well the *raison d’etre* of the exclusionary rule by denying to the government the use of evidence ‘come at by the exploitation of . . . illegality’ and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza.” Others object that it is “based on conjecture” and “can only encourage police shortcuts whenever evidence may be more readily obtained by illegal than by legal means,” and thus “collides with the fundamental purpose of the exclusionary rule.” As one commentator put it:

Such a rule is completely at odds with the purpose of the exclusionary rule. If the police will only be deprived of that evidence which the defendant can

scholarly debate, however, the *Smith* court concluded that, in its view, “the inevitable discovery exception can and should be formulated” so that it meets the concerns expressed by critics of the exception.⁶⁰

The decision of the Supreme Court of Alaska in *Smith* is particularly instructive because it illustrates some of the ways in which the inevitable discovery doctrine can be formulated to effectively balance the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime.⁶¹ For example, in *Smith*, the court rejected the majority’s decision in *Nix* that proof by a preponderance of the evidence was sufficient, instead adopting the view expressed in Justice Brennan’s dissenting opinion that “the prosecution should have the burden of proving by a clear and convincing standard of proof that the evidence would have been discovered absent the illegality.”⁶² Additionally, the *Smith* court perceived a need to safeguard against the use of the inevitable discovery exception “in cases where discovery by legal means was possible, but not truly inevitable.”⁶³

show they would not have been able to obtain had they not engaged in the illegality, they will in no way be deterred from such conduct; all they will stand to lose is what they would not have otherwise had and they might gain some advantage if something slips by. Moreover, the illegal route is often faster and easier than the legally required route.

Id. (quoting LAFAVE, *supra* note 48, at 242).

⁶⁰ *Smith*, 948 P.2d at 479 (observing that the inevitable discovery exception is amenable to varying formulations and that “many state courts have adopted some form of the inevitable discovery exception[]”).

⁶¹ See generally *infra* notes 62–67 and accompanying text (adopting a version of the inevitable discovery doctrine under its state constitution substantially different from that adopted by the Supreme Court under the United States Constitution).

⁶² *Id.* at 479 (expressly adopting the view of the Supreme Court of Hawaii, in *State v. Lopez*, 78 Haw. 433, 896 P.2d 889 (Haw. 1995) (applying clear and convincing standard), and citing to *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502, 506 (N.C. 1992) (applying clear and convincing standard), and *Commonwealth v. O'Connor*, 406 Mass. 112, 546 N.E.2d 336, 340 (Mass. 1989) (holding that inevitability must be “certain as a practical matter[]”). See also R. Bradley Lamberth, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability*, 40 BAYLOR L. REV. 129, 145 (1988) (stating that courts should adopt “clear and convincing” standard to deter police misconduct and diminish chance of courts admitting tainted evidence).

⁶³ *Smith*, 948 P.2d at 480. Addressing this concern, the court held:

The exception should come into play only when the evidence in question truly would have been discovered through procedures likely to be employed under the circumstances, rather than through unusual measures which police would only employ if given the benefit of hindsight. Accordingly, in order to invoke the exception, the prosecution “must establish, first, that certain *proper and predictable* investigatory procedures would have been utilized in the case at bar,

Finally, recognizing the potential for the inevitable discovery exception to encourage police misconduct, the *Smith* court rejected the majority's holding in *Nix* that proof of the absence of bad faith is not required and, instead, adopted the view of the Supreme Court of North Dakota⁶⁴ that the inevitable discovery exception should not be available where the police have acted in bad faith.⁶⁵

Ultimately, the *Smith* court held that "if the prosecution can show, by clear and convincing evidence, that illegally obtained evidence would have been discovered through predictable investigative processes, such evidence need not be suppressed as long as the police have not knowingly or intentionally violated the rights of the accused in obtaining that evidence."⁶⁶ Although, as recognized in *Smith*, it is a serious matter when a law enforcement officer has intentionally violated the constitution that he or she has sworn to uphold, other courts have rejected a rule barring application of the inevitable discovery exception where the offending officer has acted in bad faith, recognizing instead that the good or bad faith of the offending officer is irrelevant to the inevitable discovery analysis and that such bad faith misconduct on the part of individual officers in inevitable discovery cases is properly punishable through mechanisms other than the exclusionary rule.⁶⁷

and second, that those procedures would have inevitably resulted in the discovery of the evidence in question."

Id. (citation omitted).

⁶⁴ See *State v. Phelps*, 297 N.W.2d 769, 775 (N.D. 1980) (holding that the inevitable discovery exception cannot be used in instances "where it is clear that the police acted in bad faith in order to accelerate the discovery of the evidence in question[]").

⁶⁵ 948 P.2d at 481. Accordingly, the *Smith* court expressly held "that the exception should not be available in cases where the police have intentionally or knowingly violated a suspect's rights." *Id.*

⁶⁶ *Id.* "Taken together," the court reasoned, "the safeguards outlined above should ensure that the adoption of the inevitable discovery exception does not provide an opportunity for the prosecution to benefit from illegal activity." *Id.*

⁶⁷ See, e.g., *Nix*, 467 U.S. at 445 (rejecting a good faith requirement, reasoning that a good faith requirement would on occasion result in the suppression of evidence that would have inevitably been discovered by lawful means, finding that such a result "wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice," and that "[n]othing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach[]"); *State v. Garner*, 331 N.C. 491, 507, 417 S.E.2d 502, 511 (N.C. 1992) holding that

[i]f the State finds itself in any situation where it must prove that the evidence inevitably would have been discovered by other legal, independent means, and it fails to do so, the doctrine is not applied and the evidence is suppressed. This risk of suppression inherently preserves the deterrence value of the exclusionary rule. Further, if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse

In *State v. Flippo*,⁶⁸ the Supreme Court of Appeals of West Virginia provided another example of how a state may restrict the scope of the inevitable discovery exception so as to reduce the risk that the exception will be abused by police. Specifically, the court considered whether the inevitable discovery exception, under West Virginia law, should require the prosecution to demonstrate that the police officers were actively pursuing the lawful means that would have inevitably led to the discovery of the illegally obtained evidence.⁶⁹ Adopting a restricted formulation of the inevitable discovery exception, the court reasoned that “[i]f police are allowed to search when they possess no lawful means and are only required to show that lawful means could have been available even though not pursued, the narrow ‘inevitable discovery’ exception would ‘swallow’ the [constitutional warrant] protection.”⁷⁰

position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant.

Id.; see also *Cantrell v. Morris*, 849 N.E.2d 488, 506 n.26 (Ind. 2006) (citing *Carey v. Phipps*, 435 U.S. 247, 253 (1978) (observing that 42 U.S.C. § 1983 creates a species of tort liability against police officers of local government in favor of persons who have been deprived of their federal constitutional rights); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir.1993) (holding that to prevail under a section 1983 claim, the plaintiff must establish: (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant(s) intentionally caused that deprivation; and (4) the defendant(s) acted under color of state law); see also, e.g., *Kucenko v. Marion County Sheriff*, 2007 WL 1650939 (S.D. Ind. 2007) (observing that although the Indiana Supreme Court has not yet recognized a private cause of action for violations by law enforcement officers of Article 1, Section 11 of the Indiana Constitution, the Indiana Supreme Court explained in *Cantrell*, 849 N.E.2d at 498, that there is no need to create a new implied cause of action under the Indiana Constitution when existing tort law amply protects a right guaranteed by the Indiana Constitution). In *Kucenko*, Kucenko alleged that sheriff’s deputies, responding to an accidental 911 call made by Kucenko, had unlawfully entered and searched his apartment without a warrant and unlawfully detained him in handcuffs during the search. 2007 WL 1650939 at 1–2. The district court granted the State’s Motion for Summary Judgment on Kucenko’s claims under Article 1, Section 11 of the Indiana Constitution, but denied the State’s Motion for Summary Judgment on Kucenko’s state law tort claims for trespass and false arrest. *Id.* at 11.

⁶⁸ 212 W. Va. 560, 580, 575 S.E.2d 170, 189 (W. Va. 2002).

⁶⁹ *Id.* at 579, 189. The court noted that a minority of federal and state courts take the position that the parameters of the inevitable discovery rule should not be so broad as to legitimize an unlawful seizure of evidence, merely because the police subsequently obtained, or could have obtained, a search warrant that would have led to the ultimate seizure of that evidence. *Id.* On the contrary, the court found that a majority of federal and state courts apply a broad scope for the inevitable discovery rule, by not requiring the police to have initiated lawful means to acquire evidence prior to its seizure. *Id.* Rejecting the majority approach, the court reasoned that the minority view is consistent with the stringent warrant requirement under article III, section 6 of West Virginia’s Constitution. *Id.* at 580, 190.

⁷⁰ *Id.* at 580, 190 (citing *State v. Hatton*, 389 N.W.2d 229, 234 (Minn. Ct. App. 1986)). The court held that in order for the State,

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The decision of the New York Court of Appeals in *People v. Stith*⁷¹ provides yet another example of a case in which a state court recognized a limited version of the inevitable discovery exception. In *Stith*, the New York Court of Appeals distinguished between primary evidence and derivative evidence and held that, although the inevitable discovery exception applies to derivative evidence, it does not save primary evidence from suppression because of the danger that such application of the exception might encourage bad faith conduct on the part of the police.⁷²

Cases such as *Smith*, *Flippo*, and *Stith* illustrate the ability of state courts to adopt vastly differing forms of the inevitable discovery doctrine so as to ensure the protection of constitutional rights without

to prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.

Id. at 190–91. *But see* *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986). In an opinion joined by then Judge, now Justice, Breyer, the First Circuit rejected a requirement of active pursuit, reasoning as follows:

Rather than setting up an inflexible “ongoing” test such as the Fifth Circuit’s, we suggest that the analysis focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented. A *Nix*-like case may well require that active pursuit of the investigation be underway to satisfy the test of inevitability and independence. This requirement may also be appropriate in illegal search cases where no warrant is ever obtained. In cases where a warrant is obtained, however, the active pursuit requirement is too rigid. On the other hand, a requirement that probable cause be present prior to the illegal search ensures both independence and inevitability for the prewarrant search situation.

Id. at 746. The court then concluded that there is no necessary requirement that the warrant application process have already been initiated at the time the illegal search took place. *Id.*

⁷¹ 69 N.Y.2d 313, 506 N.E.2d 911 (N.Y. 1987).

⁷² *Id.* at 318, 913–14. In *Stith*, the court defined primary evidence as evidence obtained during or as an immediate consequence of the illegal search and derivative evidence as “evidence obtained indirectly as a result of leads or information gained from that primary evidence.” *Id.* In rejecting the application of the inevitable discovery exception to primary evidence, the court reasoned that failing to exclude wrongfully obtained primary evidence would be an unacceptable dilution of the exclusionary rule that would encourage unlawful searches in the hope that probable cause would be developed after the fact. *Id.* at 319–20, 914.

unnecessarily expanding the scope of the exclusionary rule.⁷³ The State of Indiana, however, in *Ammons v. State*,⁷⁴ became only the second state to categorically reject application of the inevitable discovery exception under any circumstances.⁷⁵ In one sweeping statement, with no analysis of the varying forms in which the inevitable discovery exception might be adopted, the Indiana Court of Appeals categorically rejected the inevitable discovery doctrine as an exception to the exclusionary rule under the Indiana Constitution.⁷⁶

⁷³ See generally *supra* notes 55–72 (highlighting the varying formulations of the inevitable discovery exception, including the ability of state courts to raise the burden of proof to clear and convincing evidence, require the absence of bad faith, bar application of the exception to primary evidence, and require proof of active pursuit or that proper investigative procedures *would* have been utilized in the case at issue). For additional examples of cases in which state courts have adopted variations of the inevitable discovery doctrine that differ from that adopted by the Supreme Court in *Nix*, see *Fain v. State*, 271 Ark. 874, 611 S.W.2d 508 (Ark. 1981) (requiring clear and convincing evidence and proof of the absence of bad faith); *Commonwealth v. O'Connor*, 406 Mass. 112, 546 N.E.2d 336 (Mass. 1989) (rejecting application of the inevitable discovery doctrine to evidence obtained in bad faith); *State v. Sugar*, 100 N.J. 214, 495 A.2d 90 (N.J. 1985) (requiring clear and convincing evidence); *People v. Turriago*, 90 N.Y.2d 77, 87, 681 N.E.2d 350, 354 (N.Y. 1997) (requiring proof of “very high degree of probability” that evidence would have inevitably been discovered); *State v. Reyes*, 98 Wn. App. 923, 993 P.2d 921 (Wash. Ct. App. 2000) (rejecting application of the inevitable discovery doctrine in cases in which the police acted unreasonably or to accelerate discovery of the evidence).

⁷⁴ 770 N.E.2d 927 (Ind. Ct. App. 2002).

⁷⁵ *Id.* at 935. See *State v. Flippo*, 575 S.E.2d 170, 188 n.23 (W. Va. 2002) (observing, “[o]nly [Indiana and Texas] appear to have expressly refused to recognize the inevitable discovery rule[]” and finding “only three states, South Carolina, Vermont, and Wyoming, that appear never to have directly addressed the issue of the inevitable discovery rule[]”). Prior to the rejection of the inevitable discovery exception by the Indiana Court of Appeals in *Ammons*, the Court of Criminal Appeals of Texas, in *State v. Daugherty*, 931 S.W.2d 268, 273 (Tex. Crim. App. 1996), rejected the inevitable discovery exception, reasoning that TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (2006), which provides:

‘No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.’

did not accommodate an inevitable discovery exception. *Id.* at 269, 275. However, four judges dissented from the majority’s rejection of the inevitable discovery exception, arguing that the inevitable discovery doctrine legally breaks the causal connection between the constitutional violation and the acquisition of the evidence and that “while the evidence may have been initially *obtained illegally*, it is admissible *only* if the State can show, *by a preponderance of the evidence*, that it would have been *inevitably obtained by legal means*.” *Id.* at 284.

⁷⁶ *Ammons*, 770 N.E.2d at 935. In refusing to recognize the inevitable discovery exception under the Indiana Constitution, the Indiana Court of Appeals explained as follows:

Under the Fourth Amendment, the inevitable discovery exception to the exclusionary rule “permits the introduction of evidence that eventually would have been located had there been no error, for in that

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As the Indiana Court of Appeals correctly noted, the inevitable discovery doctrine has never been adopted as a matter of Indiana constitutional law.⁷⁷ However, citing to *Brown v. State*,⁷⁸ the Court of

instance “there is no nexus sufficient to provide a taint.” *Shultz v. State*, 742 N.E.2d at 965 (quoting *Banks v. State*, 681 N.E.2d 235, 239 (Ind. Ct. App. 1997) (quoting *Nix v. Williams*, 467 U.S. 431, 438, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984))). However, the inevitable discovery exception has not been adopted as a matter of Indiana constitutional law. *Shultz*, 742 N.E.2d at 966 n.1. Our state supreme court has previously held that “our state constitution mandates that the evidence found as a result of [an unconstitutional] search be suppressed.” *Id.* (quoting *Brown v. State*, 653 N.E.2d at 80). In light of this clear language we are not inclined to adopt the inevitable discovery rule as a matter of Indiana constitutional law. Accordingly, the inevitable discovery doctrine is not available to validate the evidence of cocaine recovered from Ammons’ person as a result of Officer Stout’s unjustified pat-down.

Id. Although the court of appeals determined that the Indiana Supreme Court’s statement in *Brown* foreclosed any application of the inevitable discovery exception under the Indiana Constitution, *Brown* explicitly addressed only a single issue: whether the appellant was denied his right to be secure against unreasonable searches and seizures in violation of Article 1, Section 11 of the Indiana Constitution, or in violation of the Fourth and Fourteenth Amendments to the United States Constitution, when the trial court admitted evidence obtained in a warrantless search of appellant’s car. *Brown v. State*, 653 N.E.2d 77, 80 (Ind. 1995). After determining that the search of the defendant’s car was unreasonable, the Indiana Supreme Court held that the evidence must be suppressed, reasoning that “our state constitution mandates that the evidence found as a result of such a search be suppressed.” *Id.* (emphasis added). Importantly, however, the Supreme Court expressly limited its holding in *Brown* to require only that evidence found as a result of an unreasonable search be suppressed. *Id.* In the haste of the court of appeals in *Ammons* to reject the inevitable discovery exception as a matter of Indiana constitutional law, the court misunderstood the basic logic underlying the inevitable discovery exception—that “the illegality is not the cause of discovery at all, for [c]onduct is not a legal cause of an event if the event would have occurred without it,” and failed to recognize that the inevitable discovery exception is wholly consistent with the Indiana Supreme Court’s recitation of the general rule that evidence obtained as the result of an unreasonable search must be suppressed. See *Cohn*, *supra* note 53 (explaining that proof of inevitable discovery severs the causal link between the unlawful conduct and the discovery of the evidence).

⁷⁷ *Ammons*, 770 N.E.2d at 935. Although the inevitable discovery exception has never been adopted as a matter of Indiana constitutional law, it has been applied by Indiana courts in several cases in which the defendant has challenged evidence under the Fourth Amendment to the U.S. Constitution. See, e.g., *LaMunion v. State*, 740 N.E.2d 576 (Ind. Ct. App. 2000); *Banks v. State*, 681 N.E.2d 235 (Ind. Ct. App. 1997); *Jorgensen v. State*, 526 N.E.2d 1004 (Ind. Ct. App. 1988). In *LaMunion*, the Indiana Court of Appeals, interpreting the inevitable discovery exception under federal law, expressly held that the exception does not apply to primary evidence. 740 N.E.2d at 581 (citing *Jorgensen*, 526 N.E.2d at 1008). In *Jorgensen*, the court of appeals rejected the State’s argument that the unlawfully obtained evidence would inevitably have been discovered by lawful means because “the police could have secured the premises and obtained a search warrant[.]” reasoning, “[w]ere this the rule, no warrantless search supported by probable cause would be invalid.” 526 N.E.2d at 1008. Neither the Indiana Supreme Court nor the United States

Appeals, in *Ammons*, interpreted a single sentence within an opinion of the Indiana Supreme Court in a case that did not involve the inevitable discovery doctrine, as forever rejecting the inevitable discovery exception as violative of Article 1, Section 11 of the Indiana Constitution, regardless of its form or the circumstances of the case.⁷⁹ The statement of the Indiana Supreme Court so heavily relied upon by the Court of Appeals, however, enunciates only the general rule that evidence obtained as a result of police misconduct must be excluded and is strikingly similar to general statements of the United States Supreme Court regarding the exclusionary rule which has never been interpreted as, without exception, requiring the exclusion of all evidence obtained as a result of police misconduct.⁸⁰

In December of 2002, in a 3-2 decision, the Supreme Court of Indiana denied transfer in *Ammons* and left standing the blanket rejection by the Indiana Court of Appeals of the inevitable discovery doctrine under the

Supreme Court has ever ruled on the applicability of the inevitable discovery exception to primary evidence and there presently exists a split among the federal circuits as to whether any distinction between primary and derivative evidence is appropriate. See Troy E. Golden, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. PUB. L. 97, 125 (1998). See *infra* Part III.C (discussing the appropriateness of a distinction between primary and derivative evidence in inevitable discovery cases).

⁷⁸ 653 N.E.2d at 80.

⁷⁹ See *Ammons*, 770 N.E.2d at 935 (interpreting the Indiana Supreme Court's statement in *Brown*, 653 N.E.2d at 80, that "'our state constitution mandates that the evidence found as a result of [an unconstitutional] search be suppressed[,]'" as mandating that the inevitable discovery exception be rejected as a matter of Indiana constitutional law). Applying its unprecedented decision to the facts in *Ammons*, the Indiana Court of Appeals concluded:

Officer Stout performed an illegal pat-down of Ammons. However, prior to the illegal pat-down, Ammons voluntarily consented to a search of his car, which rendered Officer Clark's search of Ammons' vehicle and recovery of his handgun legal. Nevertheless, because we hold that the inevitable discovery rule is not applicable under Article 1, Section 11 of the Indiana Constitution, the cocaine recovered from Ammons' person remains suppressed. In sum, the trial court is instructed to grant Ammons' motion to suppress the cocaine but deny his motion in regards to the handgun.

Id.

⁸⁰ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding, "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court[]") (emphasis added). But see *United States v. Ceccolini*, 435 U.S. 268, 275 (1978) (observing that the exclusionary rule has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons; instead, "[r]ecognizing not only the benefits but the costs, which are often substantial, of the exclusionary rule[] . . . application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served[]").

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Indiana Constitution.⁸¹ Until the Supreme Court of Indiana squarely addresses the issue, the decision of the Indiana Court of Appeals will remain an anomaly in inevitable discovery jurisprudence, and the future of the inevitable discovery doctrine in Indiana, in any form, will remain nonexistent.

III. ANALYSIS: THE STRENGTHS AND WEAKNESSES OF THE VARIOUS FORMULATIONS

More than two decades after the Supreme Court's decision in *Nix v. Williams* adopting the inevitable discovery exception as a matter of federal constitutional law, there remains strong disagreement concerning the appropriate guidelines for applying the exception.⁸² Although there has been significant criticism of the form of the inevitable discovery exception adopted by the Court in *Nix*, the arguments of the critics generally are directed not at the exception itself, but rather at the manner in which the exception often is applied.⁸³ In fact, with the exceptions of Texas and Indiana, the inevitable discovery doctrine has been universally accepted in one form or another by every state to consider the issue.⁸⁴ While it is true that the states generally agree that the inevitable discovery doctrine is a permissible exception to the exclusionary rule, states have often disagreed as to the appropriate restrictions to attach to the rule.⁸⁵

Presently, much of the debate concerning the inevitable discovery exception has primarily centered on the standard of proof that must be

⁸¹ See *Ammons v. State*, 783 N.E.2d 704 (Ind. 2002). See also Joel Schumm, *Year-End Decisions Bring Clarity and Need for Clarification*, 46 RES. GES. 38, 40 (March 2003). Schumm observed that, after hearing oral argument on the State's petition to transfer in *Ammons*, which asked the Indiana Supreme Court to recognize the federal inevitable discovery exception to the exclusionary rule as a matter of Indiana constitutional law, the Supreme Court denied transfer by a narrow 3-2 vote. *Id.* Justice Sullivan and Justice Boehm voted to grant a transfer. *Id.* at 40 n.2. Schumm further explained, "[a]lthough the close vote suggests that the issue might later resurface, for the time being the protections afforded under Article I, Section 11 remain greater than those of the Fourth Amendment, at least in this regard." *Id.*

⁸² See generally *supra* Part II.B and accompanying text (discussing the varying opinions of legal commentators concerning the proper scope of the inevitable discovery exception); Part II.C and accompanying text (discussing the varying formulations of the inevitable discovery doctrine adopted by the states).

⁸³ See LAFAYE, *supra* note 48, at 243-44 (suggesting that courts must take care to ensure that the inevitable discovery exception is only applied in appropriate cases).

⁸⁴ See *supra* note 55 (observing that only Indiana and Texas appear to have expressly refused to recognize the inevitable discovery rule and finding that only three states appear never to have directly addressed the issue of the inevitable discovery rule).

⁸⁵ See generally *supra* Part II.C and accompanying text (describing some of the varying formulations adopted by the states).

satisfied by the prosecution to prove that illegally obtained evidence would inevitably have been discovered by lawful means, and also whether there should be a requirement that the police were acting in good faith at the time of the constitutional violation.⁸⁶ Additionally, much debate has focused on whether the inevitable discovery exception should apply to both primary evidence and derivative evidence.⁸⁷ Finally, many courts have struggled with whether it should be required that the police were actively pursuing the lawful means that would have led to the inevitable discovery of the illegally obtained evidence at the time of the constitutional violation, and whether the inevitable discovery exception should be applicable in cases in which the police had not yet applied for a warrant, but had probable cause and *could* have obtained a warrant.⁸⁸ Part III.A of this Note discusses the logic underlying the inevitable discovery exception and why this logic demands a standard of clear and convincing evidence in inevitable discovery cases.⁸⁹ Part III.B illustrates the irrelevance of a requirement of good faith in inevitable discovery cases.⁹⁰ Next, Part III.C illustrates the need to apply the exception not only to derivative evidence, but to primary evidence as well.⁹¹ Finally, Part III.D identifies the appropriate scope of the “active pursuit rule” and the “could have obtained a warrant” excuse, so as to deter police misconduct while not unduly interfering with police investigative procedures.⁹²

A. The Inevitable Discovery Exception and the Appropriate Burden of Proof

As previously explained in Part II, the exclusionary rule serves the following two dominant functions: (1) to deter lawless conduct by law enforcement authorities and (2) to close the courthouse doors to the

⁸⁶ See *supra* Part III.A and accompanying text (highlighting various arguments for and against a heightened standard of proof and a requirement of good faith).

⁸⁷ See *supra* note 54 (discussing the split among the federal circuit courts of appeals as to whether the inevitable discovery exception is applicable to primary evidence). See also *supra* note 77 (discussing two decisions of the Indiana Court of Appeals, applying federal law, holding that the inevitable discovery exception is inapplicable to primary evidence).

⁸⁸ See *supra* Part III.C and accompanying text (discussing various arguments for and against the requirement of “active pursuit” or the acceptability of the “could have obtained a warrant excuse”).

⁸⁹ See *infra* Part III.A (analyzing the arguments for and against a requirement of clear and convincing evidence in inevitable discovery cases).

⁹⁰ See *infra* Part III.B (analyzing the relevance of a requirement of good faith in inevitable discovery cases).

⁹¹ See *infra* Part III.C (analyzing the appropriateness of a distinction between primary and derivative evidence in inevitable discovery cases).

⁹² See *infra* Part III.D (analyzing the requirement that police *would* (rather than merely *could*) have obtained the challenged evidence in inevitable discovery cases).

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admission of illegally obtained evidence.⁹³ However, recognizing not only the benefits but also the substantial costs of the exclusionary rule, courts have restricted application of the rule to those areas where its remedial objectives are likely most efficaciously served.⁹⁴ The inevitable discovery exception is one example of such an occasion where “the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received.”⁹⁵

In order that courts may properly determine the appropriate contours of the inevitable discovery exception, courts must not lose sight of the basic rationale underlying the exception—unlawful police conduct is not the cause of the discovery of the evidence if the evidence would have been discovered without any reference to the illegality.⁹⁶ This logic is sound, however, only if a thorough examination of the facts of the case reveals that the evidence indeed would have been discovered regardless of the misconduct of the police.⁹⁷

⁹³ See *supra* note 42 and accompanying text (explaining that the exclusionary rule effectuates its deterrence rationale by eliminating the fruits of unlawful police conduct and that the exclusionary rule preserves the integrity and fairness of judicial proceedings through the closure of the courthouse doors to the admission of unlawfully obtained evidence). See also *supra* note 23 and accompanying text (explaining that the exclusionary rule was adopted by the Supreme Court in *Weeks v. United States*, 232 U.S. 383, 391–92 (1914), as a necessary tool to ensure that constitutional prohibitions are respected and that constitutional rights are protected).

⁹⁴ See *supra* note 28 and accompanying text (observing that the exclusionary rule has never been interpreted so broadly as to require the exclusion of all evidence illegally seized in all proceedings against all persons). See also *supra* note 30 (explaining that the exclusionary rule has become riddled with exceptions so as to ensure that the exclusionary rule is only applicable where its deterrence benefits outweigh its substantial social costs).

⁹⁵ *Nix v. Williams*, 467 U.S. 431, 432, 444 (1984) (holding that “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[] . . . [t]hen the deterrence rationale has so little basis that the evidence should be received” and that “[a]nything less would reject logic, experience, and common sense.”) (internal footnote omitted). See also *supra* note 41 and accompanying text (explaining that the exclusion of evidence that would have inevitably been discovered without any reference to illegal conduct “wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice[]”).

⁹⁶ See *supra* note 49 (discussing Cohn’s perspective: Cohn agreed with the Court in *Nix* that the inevitable discovery exception should be adopted, but disagreed with the Court’s acceptance of proof by a preponderance of the evidence as the appropriate standard in inevitable discovery cases).

⁹⁷ See *supra* note 49 (suggesting that clear and convincing evidence is the appropriate standard of proof in inevitable discovery cases and arguing that a spotty and imprecise treatment of the facts, as may occur under a standard of proof merely by a preponderance of the evidence, leads to a mechanical application of the rule that detracts from the logic that determines its validity).

Unlike the independent source exception, which allows the prosecution to introduce evidence only if it was, in fact, obtained by lawful means, the inevitable discovery exception allows the introduction of evidence that has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.⁹⁸ In Justice Brennan's opinion, "this distinction should require that the government satisfy a heightened burden of proof before it is allowed to use such evidence."⁹⁹

Although the Court in *Nix* adopted a standard of proof by a mere preponderance of the evidence, Justice Brennan's dissenting opinion, which would require the prosecution to present clear and convincing evidence of inevitable discovery, has widely been accepted by state courts in the years since *Nix* as necessary to deter abuse of the inevitable discovery exception and to ensure continued protection of the fundamental rights that the exclusionary rule so importantly protects.¹⁰⁰ State courts that have adopted the clear and convincing standard of proof have recognized that the exclusionary rule ordinarily requires the suppression of the fruits of police misconduct and that any departure from this established rule under the guise of inevitable discovery should require clear and convincing proof that the evidence, in fact, would have been discovered without the illegality.

The legitimacy of the inevitable discovery exception depends on the severance of the causal link between the police misconduct and the discovery of the evidence and, therefore, it does not pose an unfair burden on the state to require the state to prove by clear and convincing

⁹⁸ See *Nix*, 467 U.S. at 459. Justice Brennan, joined by Justice Marshall, dissenting from the Court's adoption of the preponderance of the evidence standard of proof, argued that the speculative nature of the inquiry into whether the evidence truly would inevitably have been discovered by lawful means requires the adoption of a clear and convincing evidence standard. *Id.*

⁹⁹ *Id.* at 459 (arguing that raising the burden of proof to clear and convincing evidence also serves to impress upon the fact-finder the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted).

¹⁰⁰ See generally *supra* note 62 (providing examples of state courts that require proof by clear and convincing evidence in inevitable discovery cases). See also *supra* notes 49-52 and accompanying text (providing examples of articles in which legal commentators have argued that a standard of clear and convincing evidence is necessary for the proper application of the inevitable discovery exception). See also *Nix*, 467 U.S. at 444 n.5 (emphasizing that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings[]"). But see *supra* note 50 and accompanying text (arguing that the inherently speculative nature of the inevitable discovery exception increases the risk of admitting evidence that may not have been discovered through legal means).

evidence that the discovery of the evidence was indeed inevitable.¹⁰¹ If it is not clear that the illegally obtained evidence would have inevitably been discovered through lawful means, then the logic underlying the inevitable discovery exception—that unlawful police conduct was not the legal cause of the discovery of the evidence if the evidence would have been discovered without reference to the illegality—fails for the simple reason that the sole cause of discovery, then, is the illegality.¹⁰² Thus, the very logic of the inevitable discovery exception demands not merely that it is more likely than not that the evidence *could* have been discovered; it demands clear and convincing evidence that the evidence inevitably *would* have been discovered.¹⁰³

Other concerns further illustrate the need to utilize a heightened standard of proof in inevitable discovery cases. One such concern is that the lower deterrent value of the preponderance of the evidence standard results in a greater likelihood of police violations of constitutional rights.¹⁰⁴ Of course, the incentive to abuse the inevitable discovery exception could be eliminated simply by implementing a requirement that the police act in good faith in inevitable discovery cases.¹⁰⁵

¹⁰¹ See *supra* note 62 (providing examples of state courts holding that inevitability must be “certain as a practical matter[]” and that courts should adopt the clear and convincing standard to deter police misconduct and diminish chance of courts admitting tainted evidence). *Com. v. O’Connor*, 546 N.E.2d 336, 340 (Mass. 1989).

¹⁰² Cohn, *supra* note 49, at 752 (footnote omitted) (arguing that “[r]equiring the prosecution to present clear and convincing evidence of inevitable discovery before concluding that the prosecution has met its burden of proof would deter judicial abuse of a valuable exception to the exclusionary rule and would protect the fundamental rights that the rule guarantees[]”).

¹⁰³ See *supra* note 63 and accompanying text (providing an example of a state court rejecting any argument that it is sufficient in inevitable discovery cases—that the evidence merely *could* have been discovered by lawful means—and requiring proof by clear and convincing evidence that the challenged evidence *would* have been obtained by lawful means).

¹⁰⁴ Hendrix, *supra* note 52, at 1097 (arguing that “[i]n a situation where a police officer can be reasonably sure that evidence will be discovered inevitably, the officer will not be deterred by the risk of exclusion because he believes that there is ample evidence to prove inevitable discovery by a preponderance of evidence[]”). See also Webb, *supra* note 51, at 990 (footnote omitted) (arguing that “the officer is better off acting illegally whenever the legal investigation’s chances are better than fifty percent, since the better-than-fifty-percent chance will lead to a finding of inevitable discovery[]”).

¹⁰⁵ See Hendrix, *supra* note 52, at 1096 (arguing that “[t]he harm to civil rights resulting from the temptation to take shortcuts more than outweighs the societal cost of excluding probative evidence under a lack of bad faith rule[]” and that “society has a high interest in forcing its government to obey its own laws[]”). *Smith v. State*, 948 P.2d 473, 481 (Alaska 1997). See also *supra* notes 58–67 (providing an example of a state court decision holding that the inevitable discovery “exception should not be available in cases where the police have intentionally or knowingly violated a suspect’s rights[]”); see also *supra* note 73

However, for reasons to be more fully explored in Part III.B, a good faith requirement has been largely rejected as irrelevant under inevitable discovery analysis.¹⁰⁶ The point, however, is that without the implementation of a good faith requirement, the need for a heightened burden of proof to prevent abuse of the inevitable discovery exception becomes even more apparent.¹⁰⁷

In sum, the inevitable discovery doctrine is a logical exception to the exclusionary rule; however, the exception retains its logic only when it can clearly and convincingly be shown that the evidence *would* inevitably have been obtained by lawful means.¹⁰⁸ The failure of the prosecution to satisfy the burden of clear and convincing evidence is tantamount to failing to prove that the evidence indeed, inevitably, would have been discovered by lawful means; thus, in such cases, the logic underlying the inevitable discovery exception fails for the simple reason that the illegality then is the exclusive cause of the discovery of the challenged evidence.¹⁰⁹ Accordingly, a standard of clear and convincing evidence is necessary to preserve the logic that determines the validity of the inevitable discovery exception.¹¹⁰

(providing additional examples of state court decisions requiring proof of the absence of bad faith in inevitable discovery cases).

¹⁰⁶ See Cohn, *supra* note 49, at 749 (explaining that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the evidence and that it makes no sense to invoke a good or bad faith test because the *mens rea* of the offending officer is irrelevant to the question of causation). See also *Nix*, 467 U.S. at 445 (1984). In *Nix*, the Court unanimously rejected a good faith requirement, with the majority reasoning that a good faith requirement would on occasion result in the suppression of evidence that would inevitably have been discovered by lawful means. *Id.* The Court concluded that such a result “wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice[]” and that “[n]othing in this Court’s prior holdings supports any such formalistic, pointless, and punitive approach.” *Id.*

¹⁰⁷ See Cohn, *supra* note 49, at 752 (arguing that “[r]equiring the prosecution to present clear and convincing evidence of inevitable discovery before concluding that the prosecution has met its burden of proof would deter judicial abuse of a valuable exception to the exclusionary rule and would protect the fundamental rights that the rule guarantees[]”).

¹⁰⁸ See *id.* (arguing that unlawful conduct is not the legal cause of the discovery of the challenged evidence only if the event *would* have been discovered regardless of the unlawful conduct).

¹⁰⁹ See *id.* at 750 (arguing that, in any case in which the inevitable discovery rule is applicable, the court must examine thoroughly the facts of the case before the rule is introduced in order to determine if the evidence indeed would have been discovered regardless of the police misconduct and further arguing that “[a] spotty and imprecise treatment of the facts[] . . . leads to a mechanical application of the rule and detracts from the logic that determines its validity[]”).

¹¹⁰ See Fishkin, *supra* note 50 (arguing that: (1) the lower deterrent value of the preponderance of the evidence standard results in a greater likelihood of police violations

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B. *The Inevitable Discovery Exception and the Irrelevance of a Good Faith Requirement*

In *Nix*, the Supreme Court unanimously agreed that the inevitable discovery exception contains no requirement that the prosecution prove the absence of bad faith.¹¹¹ While the Court provided various justifications for its rejection of a good faith requirement, the majority failed to discuss one very important reason why consideration of the good or bad faith of the offending officer is irrelevant to the inevitable discovery analysis—proof of inevitable discovery by lawful means severs any causal connection between the misconduct and the discovery of the challenged evidence; thus, it makes no sense to invoke a good or bad faith test because the mens rea of the offending officer is irrelevant to the question of causation.¹¹² Where the prosecution has proven that

of constitutional rights; (2) the inherently speculative nature of the inevitable discovery exception increases the risk of admitting evidence that might never have otherwise been discovered through legal means; and (3) the defendant's interest not having admitted against him evidence obtained as a result of unlawful police conduct, outweigh the government's interest in applying the lower standard of proof by a preponderance of the evidence).

¹¹¹ See *supra* notes 41 and accompanying text (explaining that the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce). The Court in *Nix*, reasoned that "[t]he requirement that the prosecution must prove the absence of bad faith. . . would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful activity[.]" placing the police in a *worse* position than they would have obtained if no unlawful conduct had occurred. 467 U.S. at 445. The Court further rejected the argument that a good-faith requirement is necessary to deter unlawful police conduct, and further explained that "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered[]" and that, if a police officer is aware that evidence inevitably will be discovered, he will try to avoid engaging in questionable practices because "there will be little to gain from taking any dubious 'shortcuts' to obtain the evidence." *Id.* at 445–46. Finally, the court explained that "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted, regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings[]" because, in that situation, "the State has gained no advantage at trial and the defendant has suffered no prejudice[.]" because, "suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct." *Id.* at 447.

¹¹² *Nix v. Williams*, 467 U.S. 431, 447 (1984). The Court explained that [a]dmission of the victim's body, if it inevitably would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of [the detective] . . . is therefore simply irrelevant. If the trial process was not tainted as a result of his conduct, this defendant received the type of trial that the *Sixth Amendment* envisions.

the challenged evidence would inevitably have been discovered without reference to the unlawful police conduct, the lawful means through which the police inevitably would have discovered the evidence, implicit in which is always good faith intent, replaces the misconduct as the legal cause of the discovery of the challenged evidence.¹¹³

Although the logic of the inevitable discovery exception seemingly commands the rejection of a good faith requirement, some courts and commentators disagree.¹¹⁴ For instance, in *Smith*,¹¹⁵ the Supreme Court

Id. (emphasis added); see also *supra* note 67 (explaining that if the State carries the burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant).

¹¹³ See Cohn, *supra* note 53, at 750 (agreeing with the Court's rejection in *Nix* of a good faith requirement as "pointless" and "punitive" and arguing that "a 'good faith' test would force society to pay for the mistakes of its law enforcement officials; because of police infractions, courts would exclude evidence that would have been discovered through lawful means, and potentially dangerous criminals would escape conviction with impunity."). See also Part I (describing *United States v. Holland*, 2003 U.S. Dist. LEXIS 14090 (W.D. TN 2003), in which application of a requirement of proof of the absence of bad faith may have required the unnecessary and inappropriate exclusion of evidence that inevitably would have been obtained by lawful means and without reference to any police misconduct). In *United States v. Holland*, 2003 U.S. Dist. LEXIS 14090 (W.D. TN 2003), Officer Vaughn had obtained a valid search warrant for the home of Mr. Holland; however, prior to having an opportunity to execute the search warrant, two patrol officers responded to Mr. Holland's home in reference to a report of a deceased body in the trunk of a vehicle in Mr. Holland's garage. *Id.* at 5-7. While investigating, the officers testified that they smelled a strong odor consistent with the decomposition of human remains emanating from the garage and that they observed a vehicle in the garage that matched the type of vehicle alleged to contain a deceased body. *Id.* at 7-8. Rather than obtaining a search warrant, however, the officers forced entry into Mr. Holland's garage and searched the trunk of the vehicle, wherein they discovered the challenged primary evidence: the body of a murder victim. *Id.* at 8-9. The trial court held that this search was constitutionally unreasonable but denied the defendant's motion to suppress the fruits of the unreasonable search because the evidence would have inevitably been discovered by Officer Vaughn pursuant to the search warrant that he had obtained and planned to execute in short order. *Id.* at 21-23. If the law had required the State to prove the absence of bad faith, the court may have been required to suppress any evidence of the victim's body due to the apparent disregard by the two patrol officers for Holland's Fourth Amendment rights regardless of the fact that Officer Vaughn, acting in good faith and without reference to the unlawful conduct of the patrol officers, would have inevitably discovered the body soon afterward pursuant to a validly issued search warrant. *Id.* at 23. In essence, applying the exclusionary rule in such a case would require the victim's family and society as a whole to bear the enormous consequences of the overzealousness and indiscretion of the two patrol officers without regard for the fact that such misconduct was not, in fact, the legal cause of discovery of the victim's body. *Id.* See *supra* note 49 (explaining that illegality is not the legal cause of the discovery of challenged evidence if the evidence would inevitably have been discovered without reference to the illegality).

¹¹⁴ See Cohn, *supra* note 52 (arguing that the court's refusal to include a lack of bad faith requirement will allow police to purposely violate defendants' rights in the interest of accelerating investigations and would work as an open invitation to illegal action, and also

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of Alaska, adopting the view of the Supreme Court of North Dakota,¹¹⁶ rejected the Court's decision in *Nix* that proof of the absence of bad faith is not required and held instead that the inevitable discovery exception is unavailable in cases in which the police have acted in bad faith.¹¹⁷

This approach of the Supreme Court of Alaska accepts precisely, although much too hastily, the rule recognized by Judge, later Justice, Cardozo that "[t]he criminal is to go free because the constable has blundered."¹¹⁸ As the Court wisely, and unanimously, held in *Nix*, "when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible[.]" regardless of the constable's blunder.¹¹⁹ Reflecting back on the basic logic of the inevitable discovery exception, the bad faith of the police officer who engaged in the misconduct is irrelevant if the prosecution can prove that the police would inevitably have obtained the evidence through lawful means, implicit in which is always good faith, because, in

arguing that the harm to civil rights resulting from the temptation to take shortcuts, coupled with society's high interest in forcing its government to obey its own laws, more than outweighs the societal cost of excluding probative evidence under a lack of bad faith rule).

¹¹⁵ 948 P.2d 473 (Alaska 1997).

¹¹⁶ See *State v. Phelps*, 297 N.W.2d 769, 775 (N.D. 1980) (holding that the inevitable discovery exception cannot be used in instances "where it is clear that the police acted in bad faith in order to accelerate the discovery of the evidence in question[.]").

¹¹⁷ 948 P.2d at 481 (reasoning that the inevitable discovery "exception should not be available in cases where the police have intentionally or knowingly violated a suspect's rights[.]").

¹¹⁸ See *Nix*, 467 U.S. 431, 447, 448 (1984) (quoting *People v. Defore*, 150 N.E. 585, 587 (1926)). In *Nix*, the majority noted that Judge, later Justice, Cardozo further considered how far-reaching the societal effect of the exclusionary rule would be when, "[the] pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious[.]" *Id.* at 447-48 (quotations omitted) (quoting *Defore*, 150 N.E. at 588). Even more prophetically, Judge Cardozo speculated that some day, "some court might press the exclusionary rule to the outer limits of its logic—or beyond—and suppress evidence relating to the 'body of a murdered' victim because of the means by which it was found." *Id.* at 448 (citing *Defore*, 150 N.E. at 588).

¹¹⁹ See *id.* at 448. The court observed that "[t]he requirement that the prosecution must prove the absence of bad faith[.] . . . would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful activity[.]" and that the police would then be placed in a *worse* position than they would have obtained if no unlawful conduct had occurred. *Id.* at 445. The Court further unanimously agreed that "the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce[.]" and that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446.

such an instance, it is the lawful means and not the misconduct that serves as the legal cause of the discovery of the evidence.¹²⁰

Contrary to the view of the Supreme Court of Alaska that proof of the absence of bad faith should be required in inevitable discovery cases, other states, consistently with the purposes of the exclusionary rule, have joined the Supreme Court in rejecting such a requirement.¹²¹ As the Supreme Court has explained, the exclusionary rule serves two dominant functions: (1) to deter lawless conduct by law enforcement officers and (2) to close the doors of the courts to any use of evidence unconstitutionally obtained.¹²² The Court has further explained, however, that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have occupied if no police misconduct

¹²⁰ See, e.g., *supra* note 53 and accompanying text (arguing that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence and that it makes no sense to invoke a good or bad faith test because the *mens rea* of the offending officer is irrelevant to the question of causation). See also *State v. Garner*, 331 N.C. 491, 507, 417 S.E.2d 502, 511 (N.C. 1992) (providing an example of a state court decision holding that,

[i]f the State finds itself in any situation where it must prove that the evidence inevitably would have been discovered by other legal, independent means, and it fails to do so, the doctrine is not applied and the evidence is suppressed. This risk of suppression inherently preserves the deterrence value of the exclusionary rule

and that “if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant”). See also *Nix*, 467 U.S. at 456. Justice Stevens, concurring with the majority, also rejected any requirement of proof of the absence of bad faith on the part of the offending officer, explaining:

Admission of the victim’s body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of [the detective] is therefore simply irrelevant. If the trial process was not tainted as a result of his conduct, this defendant received the type of trial that the *Sixth Amendment* envisions.

Id. (emphasis added).

¹²¹ See *Garner*, 331 N.C. at 507, 417 S.E.2d 502, 511 (in which the North Carolina Supreme Court rejected a good faith requirement and the argument that the inevitable discovery exception encourages police misconduct, reasoning that the ultimate risk of suppression in inevitable discovery cases inherently preserves the deterrence value of the exclusionary rule and that, if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant).

¹²² See generally *supra* notes 21–31 and accompanying text (describing the development of, and justification for, the exclusionary rule).

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had occurred.¹²³ Therefore, the predominant goal of the exclusionary rule is not to punish individual police officers for engaging in misconduct but, rather, to ensure the fairness and integrity of criminal trials by eliminating any advantage gained by the state through the unlawful conduct of its law enforcement officers.¹²⁴ The inevitable discovery exception is, thus, perfectly compatible with the purposes of the exclusionary rule: the exception applies only to evidence that inevitably would have been obtained through *lawful means* and for which such lawful means, and not police misconduct, serves as the legal cause of discovery.¹²⁵ On the contrary, a requirement of good faith and its punitive consequences would run counter to the purposes of the exclusionary rule by bestowing upon defendants an entirely undeserved windfall and by removing the police to a position far worse than they would have occupied had no misconduct taken place.¹²⁶

Although it is a serious matter when a law enforcement officer has intentionally violated the constitution that he or she has sworn to uphold, a blanket rule barring application of the inevitable discovery exception, where the offending officer has acted in bad faith, is unwarranted and inappropriate because the good or bad faith of the offending officer is irrelevant to the inevitable discovery analysis, and such bad faith misconduct on the part of individual officers in inevitable discovery cases is properly punishable through mechanisms other than the exclusionary rule.¹²⁷

¹²³ See *Nix*, 467 U.S. at 446 (explaining that “[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial”). The Court further explained that “[s]uppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice” and that the exclusion of such evidence would do nothing to ensure the fairness of the criminal trial because fairness can be ensured merely “by placing the State and the accused in the same positions they would have been in had impermissible conduct not taken place.” *Id.* at 447.

¹²⁴ *Id.* at 445 (explaining that the exclusion of evidence that inevitably would have been discovered without any reference to illegal conduct “wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice[]” and that “[n]othing in this Court’s prior holdings supports any such formalistic, pointless, and punitive approach[]”).

¹²⁵ See *supra* note 49 (explaining that unlawful conduct is not the legal cause of the discovery of evidence if the evidence would inevitably been discovered without any reference to the illegality).

¹²⁶ See *supra* note 53 (also arguing that a good faith test would force society to pay for the mistakes of its law enforcement officials; because of police infractions, courts would exclude evidence that would have been obtained through lawful means, and potentially dangerous criminals would escape conviction with impunity).

¹²⁷ See *supra* note 53 (explaining that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence). See also *supra* note 67 and accompanying text (discussing the ability of individuals who have been

C. The Inevitable Discovery Exception and Its Application to Primary Evidence

Presently, a circuit split exists among the federal circuit courts of appeals concerning whether the inevitable discovery exception applies only to derivative evidence (evidence derived from the misconduct that is an unknown, indirect future byproduct that inevitably would have been obtained through legal means) or if it also reaches primary evidence (evidence immediately known and actually obtained directly after the misconduct).¹²⁸ Some argue that application of the inevitable discovery exception to primary evidence would have the effect of encouraging police misconduct because, with respect to primary evidence, the police are frequently in a position to know whether evidence obtained through misconduct would inevitably have been discovered by lawful means.¹²⁹

Another argument for limiting application of the inevitable discovery exception to derivative evidence is that if it was extended to preserve primary evidence, the police could simply argue, in every case in which they had probable cause from which they *could* have obtained a warrant, that the evidence eventually would have lawfully been found because a search warrant *could* have been obtained.¹³⁰ Desiring to eliminate the potential for such results, some courts have rather simplistically held that the inevitable discovery exception is not applicable to primary evidence.¹³¹ The Indiana Court of Appeals,

denied rights guaranteed by the United States Constitution to recover damages under 42 U.S.C. § 1983 and the ability of individuals who have been denied rights guaranteed under Article 1, Section 11 of the Indiana Constitution to recover damages under state tort law).

¹²⁸ See *supra* note 54 (discussing the split among the federal circuit courts of appeals with respect to the application of the inevitable discovery exception to primary evidence).

¹²⁹ See *supra* note 40 (explaining that one argument against application of the exception to primary evidence suggests that the Court's decision in *Nix* was limited only to derivative evidence (information leading to the location of the victim's body) because, with respect to derivative evidence, the exclusionary rule's deterrent purpose is sufficiently safeguarded by the fact that the police officer cannot possibly have known at the time of his misconduct what unknown indirect future byproducts of his misconduct would be discovered and whether other independent lawful means would inevitably have resulted in the discovery of such byproducts.) See Liljestrom, *supra* note 57, at 184. On the contrary, the argument goes, the deterrent purpose of the exclusionary rule is completely destroyed with respect to primary evidence because the police officer is aware at the time of his misconduct of precisely what evidence will be obtained and is in a better position to determine whether the evidence would inevitably have been obtained if not for his misconduct. *Id.*

¹³⁰ See *supra* note 77 and accompanying text (discussing two cases in which the Indiana Court of Appeals, applying federal law, has expressly refused under any circumstance to apply the inevitable discovery exception to primary evidence).

¹³¹ See *supra* note 54 and accompanying text (discussing the arguments underlying decisions refusing to apply the inevitable discovery exception to primary evidence).

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applying federal law in cases arising under the Fourth Amendment to the United States Constitution, has accepted this argument and refused to apply the inevitable discovery exception to primary evidence, reasoning that if the exception were applied to primary evidence, “no warrantless search supported by probable cause would be invalid.”¹³² This restriction of the exception to derivative evidence, however, is flawed because it fails to recognize that the decisive factor regarding whether the inevitable discovery exception should apply to certain evidence is not whether the evidence is primary or derivative but, rather, whether the causal link between the unlawful police conduct and the discovery of the evidence has been severed because the evidence would have been discovered by lawful means, regardless of the police misconduct.¹³³

Additionally, the need to exclude primary evidence from the scope of the inevitable discovery exception can be eviscerated simply by attaching an additional safeguard to the inevitable discovery doctrine: a requirement that the police *would* have utilized proper and predictable investigative processes in the particular case and that such processes *would* have resulted in the lawful discovery of the challenged evidence.¹³⁴ For the reasons more fully discussed in Part III.D, it is not sufficient for inevitable discovery purposes that the police merely *could* have obtained a warrant.¹³⁵ With a requirement of proof that certain investigative procedures *would* have been pursued, the concern that the inevitable discovery exception could be abused such that “no warrantless search supported by probable cause would be invalid[]” is eliminated, and any

¹³² *LaMunion v. State*, 740 N.E.2d 576, 581 (Ind. Ct. App. 2000); *Jorgensen v. State*, 526 N.E.2d 1004, 1008 (Ind. Ct. App. 1988). In support of this reasoning, the court of appeals has rather unconvincingly argued that if the exception were extended to also preserve primary evidence, then the police could simply argue in every case, in which they had probable cause from which they *could* have obtained a warrant, that the evidence eventually *would* have been found lawfully because the search warrant *could* have been obtained. See *Lamunion*, 740 N.E.2d at 581; *Jorgensen*, 526 N.E.2d at 1008.

¹³³ See *supra* note 53 (explaining that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence).

¹³⁴ See *supra* notes 58–67 and accompanying text (providing an example of a state court that requires the State to prove not merely that it *could* have obtained the challenged evidence by lawful means, but that it *would* have pursued such lawful procedures for obtaining the evidence in the particular case at issue).

¹³⁵ See *supra* note 61 (explaining that it is not sufficient that the police merely *could* have discovered the evidence by lawful means but, instead, requiring the State to prove that it *would* have obtained the evidence by lawful means).

distinction between primary and derivative evidence is rendered completely unnecessary.¹³⁶

The simple “one size fits all” approach taken by courts that have rejected the application of the inevitable discovery exception to primary evidence fails to take into account those cases in which primary evidence truly would have been discovered by lawful means and for which the inevitable discovery exception is completely appropriate.¹³⁷ Under the rule that the inevitable discovery exception can never be applied to primary evidence, designed to ensure the protection of the deterrent purpose of the exclusionary rule, any primary evidence would be suppressed without regard to whether the evidence truly would have been discovered by lawful means and without reference to any prior misconduct.¹³⁸ Such a result, however, runs directly counter to the Court’s holding in *Nix v. Williams* – that if the prosecution can establish that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received.¹³⁹

¹³⁶ *LaMunion*, 740 N.E.2d at 581; see generally *supra* notes 58–67 (providing an example of a state court attaching additional safeguards to the inevitable discovery exception to protect it from judicial abuse while not barring the exception from reaching primary evidence).

¹³⁷ See generally *supra* Part I (providing an example of a case in which the inevitable discovery exception was correctly held to be applicable to primary evidence). In *United States v. Holland*, 2003 U.S. Dist. LEXIS 14090 (W.D. TN 2003), Officer Vaughn had obtained a valid search warrant for the home of Mr. Holland; however, prior to having an opportunity to execute the search warrant, two officers dispatched to Mr. Holland’s home in reference to a report of a deceased body in the trunk of a vehicle in Mr. Holland’s garage. *Id.* at 5–7. While investigating the reported presence of a body at Mr. Holland’s residence, the officers testified that they smelled a strong odor consistent with the decomposition of human remains emanating from the garage and that they observed a vehicle in the garage that matched the type of vehicle alleged to contain a deceased body. *Id.* at 7–8. Rather than obtaining a search warrant, however, the officers forced entry into Mr. Holland’s garage and searched the trunk of the vehicle, wherein they discovered the challenged primary evidence: the body of a murder victim. *Id.* at 8–9. The trial court held that this search was constitutionally unreasonable but denied the defendant’s motion to suppress the fruits of the unreasonable search because the evidence would inevitably have been discovered by Officer Vaughn pursuant to the search warrant that he had obtained and planned to execute in short order. *Id.* at 21–23. On the contrary, if the rule that the inevitable discovery exception does not apply to primary evidence had been applied in *Holland*, the evidence relating to the murder victim’s body undoubtedly would have been suppressed regardless of the fact that Officer Vaughn inevitably would have discovered the victim’s body pursuant to his validly obtained search warrant. See *id.* at 23.

¹³⁸ See, e.g., *supra* notes 71–72 and accompanying text (providing an example of a state court decision holding that, although the inevitable discovery exception applies to derivative evidence, it does not save primary evidence from suppression).

¹³⁹ 467 U.S. 431, 444 (1984) (further explaining that “[a]nything less would reject logic, experience, and common sense”).

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Much like the good faith requirement rejected by the Court in *Nix*, an absolute rule barring application of the inevitable discovery rule to primary evidence is intended to protect the deterrent purpose of the exclusionary rule.¹⁴⁰ Also, like a requirement of good faith, removing primary evidence from the scope of the exception would at times require the exclusion of evidence that inevitably would have been discovered without any reference to illegal conduct.¹⁴¹ However, as the Court observed with respect to a good faith requirement, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that an exclusion of primary evidence might produce, and such a result “wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice.”¹⁴² Instead of losing sight of the basic logic of the inevitable discovery exception by focusing on unnecessary distinctions between primary and derivative evidence, the focus in inevitable discovery cases should at all times remain simply on whether the evidence truly would inevitably have been discovered by lawful means without reference to unlawful police conduct: if the challenged evidence would inevitably have been discovered by lawful means, the causal link between any unlawful police

¹⁴⁰ See *supra* note 71 (rejecting the application of the inevitable discovery exception to primary evidence, reasoning that the failure to exclude wrongfully obtained primary evidence would be an unacceptable dilution of the exclusionary rule that would encourage unlawful searches in the hope that probable cause would be developed after the fact).

¹⁴¹ See generally Part I (providing an example of a case in which a blanket rejection of the applicability of the inevitable discovery exception to primary evidence would have resulted in the exclusion of evidence of a murder victim’s body regardless of the fact that the evidence would have been discovered in short order by lawful means and without reference to any unlawful police conduct).

¹⁴² See *Nix*, 467 U.S. at 445. The court held:

if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted, regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct.

Id. at 447 (emphasis added). The court further argued that, contrary to the arguments of the courts requiring the exclusion of primary evidence—that police will be more prone to engage in misconduct when relatively certain that the evidence would inevitably have been discovered by lawful means—if “a police officer is aware that evidence inevitably will be discovered, he will try to avoid engaging in questionable practices . . . [because] ‘there will be little to gain from taking any dubious ‘shortcuts’ to obtain the evidence.’” *Id.* at 445-46.

conduct and the discovery of the evidence is severed, regardless of whether the challenged evidence was primary or derivative.¹⁴³

D. The Inevitable Discovery Exception and the Requirement of Active Pursuit

Two other contentious issues over which courts are presently split are whether police may simply rely on the “could have gotten a warrant excuse[]” and whether the inevitable discovery exception requires a demonstration that the lawful means that made the discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct.¹⁴⁴ To resolve these issues, it is helpful to revisit the logic that determines the validity of the inevitable discovery exception: when the evidence would inevitably have been obtained by lawful means, the illegality is not the legal cause of discovery at all if the challenged evidence would have been discovered without reference to the illegality.¹⁴⁵ This logic, however, only holds where the illegally obtained evidence *would* have been obtained by lawful means; where the evidence would not have been so obtained, the sole cause of the discovery of the evidence, then, is the illegal conduct, and exclusion of the evidence is appropriate.¹⁴⁶ Therefore, it is not sufficient that the police merely *could* have obtained the evidence by lawful means; rather, in any case in which the inevitable discovery rule is applicable, the state must show that the challenged evidence, in fact, *would* have been discovered because

¹⁴³ See *supra* note 53 (explaining that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence). See also *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986). In *Silvestri*, then Judge, now Justice, Breyer suggested that, rather than adopting bright-line rules not capable of adaptation to differing fact patterns, “the analysis [should] focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented.” *Id.* at 746.

¹⁴⁴ See *Golden*, *supra* note 54, at 125 (observing that the federal circuits have split on the issue of whether the police may simply rely on the “we could have gotten a warrant excuse” as proof that the evidence would have inevitably been discovered, whether the choice to disregard the warrant requirement eliminates the applicability of the exception, and whether the inevitable discovery exception requires a demonstration that the lawful means that made the discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct).

¹⁴⁵ See *supra* note 53 (reasoning that proof of inevitable discovery severs any causal connection between the misconduct and the discovery of the challenged evidence).

¹⁴⁶ See *Cohn*, *supra* note 49, at 750 (arguing that “[i]n any case in which the inevitable discovery rule is applicable, the court must examine thoroughly the facts of the case before the rule is introduced, in order to determine if the evidence indeed would have been discovered regardless of the police’s misconduct[]”, and further arguing that “[a] spotty and imprecise treatment of the facts[] . . . leads to a mechanical application of the rule and detracts from the logic that determines its validity[]”).

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proving anything less is tantamount to failing to prove that the discovery of the evidence was truly inevitable.¹⁴⁷

In *Flippo*,¹⁴⁸ the Supreme Court of Appeals of West Virginia considered whether the inevitable discovery exception, under West Virginia law, should require the prosecution to demonstrate that the police were actively pursuing the lawful means that would inevitably have led to the discovery of the illegally obtained evidence. Rejecting the approach of the majority of jurisdictions, the court reasoned that “[i]f police are allowed to search when they possess no lawful means and are only required to show that lawful means could have been available even though not pursued, the narrow ‘inevitable discovery’ exception would ‘swallow’ the [constitutional warrant] protection.”¹⁴⁹

In *Smith*,¹⁵⁰ the Alaska Supreme Court similarly perceived “a need to safeguard against the use of the inevitable discovery exception in cases where discovery by legal means was possible, but not truly

¹⁴⁷ See generally *supra* notes 58–67 and accompanying text (providing an example of a state court perceiving the need to protect against application of the inevitable discovery exception in cases in which “discovery by legal means was possible, but not truly inevitable[.]”). In *Smith v. State*, 948 P.2d 473, 480 (Alaska 1997), addressing this concern, the court held as follows:

The exception should come into play only when the evidence in question truly would have been discovered through procedures likely to be employed under the circumstances, rather than through unusual measures which police would only employ if given the benefit of hindsight. Accordingly, in order to invoke the exception, the prosecution ‘must establish, first, that certain *proper and predictable* investigatory procedures would have been utilized in the case at bar, and second, that those procedures would have inevitably resulted in the discovery of the evidence in question.’

Id. (citation omitted).

¹⁴⁸ 212 W. Va. 560, 580, 575 S.E.2d 170, 189 (W. Va. 2002). In *Flippo*, the court noted that a minority of federal and state courts take the position that the parameters of the inevitable discovery rule should not be so broad as to legitimize an unlawful seizure of evidence merely because the police subsequently obtained, or could have obtained, a search warrant that would have led to the ultimate seizure of that evidence. *Id.* at 579, 575 S.E.2d at 189. On the contrary, the court found that a majority of federal and state courts apply a broad scope for the inevitable discovery rule, by not requiring the police to have initiated lawful means to acquire evidence prior to its seizure. *Id.*

¹⁴⁹ *Id.* at 580, 575 S.E.2d at 190 (citing *LAFAVE, supra* note 48, at 11.4). Accordingly, the court in *Flippo* held that to prevail under the inevitable discovery exception to the exclusionary rule, West Virginia’s Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct. *Id.* at 581, 575 S.E.2d at 191.

¹⁵⁰ 948 P.2d 473 (Alaska 1997).

inevitable.”¹⁵¹ Contrary to the court’s approach in *Flippo*, however, the *Smith* court held only that “in order to invoke the exception, the prosecution ‘must establish, first, that certain *proper and predictable* investigatory procedures would have been utilized in the case at bar, and second, that those procedures would have inevitably resulted in the discovery of the evidence in question.”¹⁵²

Like the *Smith* court, other courts have rejected a rule of active pursuit as too rigid and inflexible, electing instead to focus specifically on the questions of independence and inevitability.¹⁵³ Although the opinions of the courts in *Flippo* and *Smith* vary to some degree, and *Silvestri* to a larger degree, they are similar in that they all require proof that the police *would*, rather than *could*, have obtained the evidence by lawful means.¹⁵⁴ As previously discussed, such a requirement is essential to protecting the logic that underlies the inevitable discovery exception.¹⁵⁵ Thus, where it can be established that evidence obtained through police misconduct *would* inevitably have been discovered through lawful means, the inquiry should end, regardless of whether the police were actively pursuing the evidence at the moment of the illegality.¹⁵⁶

¹⁵¹ *Id.* at 480 (holding that “[t]he exception should come into play only when the evidence in question truly would have been discovered through procedures likely to be employed under the circumstances, rather than through unusual measures which police would only employ if given the benefit of hindsight[.]”).

¹⁵² *Id.* (internal quotations omitted) (citing LAFAVE, *supra* note 48, at 11.4). In so holding, the *Smith* court did not require, as did the *Flippo* court, that the prosecution show that a lawful alternative line of investigation was actively being pursued prior to the time of the misconduct. *Id.*

¹⁵³ See *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986) (concluding that there is no necessary requirement that the warrant application process have already been initiated at the time the illegal search took place and suggesting instead that, rather than adopting bright-line rules not capable of adaptation to differing fact patterns, “the analysis [should] focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented”).

¹⁵⁴ See generally *supra* Part III.D (discussing the approaches courts have taken in response to the perceived need to protect against application of the inevitable discovery exception in cases in which it is possible that evidence could have been discovered by legal means, but not truly inevitable).

¹⁵⁵ Cohn, *supra* note 49, at 750 (arguing that “[i]n any case in which the inevitable discovery rule is applicable, the court must examine thoroughly the facts of the case before the rule is introduced, in order to determine if the evidence indeed would have been discovered regardless of the police’s misconduct,” and further arguing that “[a] spotty and imprecise treatment of the facts[] . . . leads to a mechanical application of the rule and detracts from the logic that determines its validity[.]”).

¹⁵⁶ Hessler, *supra* note 54, at 278 (arguing against the adoption of the active pursuit doctrine as an unsupported extension of the Court’s holding in *Nix* that operates as a formalistic “‘bright-line’ rule ill-equipped to address the multiple fact patterns that implicate the Fourth Amendment exclusionary rule[.]” and arguing in favor of the adoption

Applying these principles, the Alaska Supreme Court adopted a logical formulation of the inevitable discovery doctrine: the prosecution “must establish, first, that certain *proper and predictable* investigatory procedures would have been utilized in the case at bar, and second, that those procedures would have inevitably resulted in the discovery of the evidence in question.”¹⁵⁷ Thus, under the foregoing test, police will be precluded from simply utilizing the “could have gotten a warrant excuse,” and will be required to prove that they would have obtained a warrant, or that they would have pursued other proper and predictable investigative procedures that would inevitably have led to the lawful discovery of the challenged evidence.¹⁵⁸ Additionally, the test provided in *Smith* does not require application of a rigid and inflexible rule of active pursuit that so concerned the First Circuit in *Silvestri*.¹⁵⁹ Instead, the *Smith* test simply permits application of flexible rules that preserve the logic of the inevitable discovery exception by requiring proof that the evidence would have been discovered, without imposing additional unnecessary obstacles to the admission of evidence of unquestioned truth in the quest for justice.¹⁶⁰

IV. CONTRIBUTION: A PROPOSED SOLUTION TO THE INEVITABLE DISCOVERY CONTROVERSY

Although the inevitable discovery doctrine has enjoyed nearly universal acceptance throughout its now well-established history, courts often have failed to formulate the doctrine in a manner that remains true

of an “independent circumstances test” that would establish inevitability in the absence of active pursuit).

¹⁵⁷ See *Smith*, 948 P.2d at 480 (internal quotations omitted) (citing 5 Wayne R. LaFare, *Search and Seizure* 11.4 (3d ed. 1996)) (recognizing that the exception should be available only when the challenged evidence truly would have been discovered through procedures that would have been employed in the case at issue).

¹⁵⁸ See generally notes 58–67 and accompanying text (describing the approach taken by the Alaska Supreme Court in *Smith v. State*, 948 P.2d 473 (Alaska 1997), in response to its perceived need to protect against application of the inevitable discovery exception in cases in which it is possible that evidence could have been discovered by legal means, but was not truly inevitable).

¹⁵⁹ See *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986) (concluding that there is no necessary requirement that the warrant application process have already been initiated at the time the illegal search took place and suggesting instead that, rather than adopting bright-line rules not capable of adaptation to differing fact patterns, “the analysis [should] focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented”).

¹⁶⁰ See *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984) (in which the Supreme Court explained that it was “unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries.”).

to the logic upon which the doctrine depends.¹⁶¹ Further, contrary to the great weight of authority, Indiana has categorically, and unjustifiably, rejected the exception based on a faulty understanding of the fundamental premise underlying the doctrine.¹⁶² Responding to this dilemma, Part IV.A reiterates the basic logic of the inevitable discovery exception and proposes a logical formulation of the inevitable discovery doctrine to be applied by Indiana judges when considering whether the inevitable discovery exception is applicable to a particular set of facts.¹⁶³ Part IV.B applies the guidelines of *Holland* to a real-life fact pattern to illustrate the need for, and proper application of, the inevitable discovery exception.¹⁶⁴

Many problems and shortcomings exist with respect to the various formulations of the inevitable discovery exception adopted by the Supreme Court and the states. Reflecting back on the fundamental premise of the inevitable discovery exception that illegality is not the legal cause of discovery if the evidence would have been discovered regardless of the illegality, the inevitable discovery exception simply is inappropriate where it is unclear whether the challenged evidence would have been discovered without the illegality.¹⁶⁵ The absence of adequate safeguards allows for the improper application of the inevitable discovery exception in cases in which it is unclear whether the

¹⁶¹ See *State v. Flippo*, 575 S.E.2d 170, 188 (W.V. 2002) (observing that “[i]t has been suggested that ‘in carving out the ‘inevitable discovery’ exception . . . courts must use a surgeon’s scalpel and not a meat axe,” (citing LAFAVE, *supra* note 48, at 244), however, “[a] review of judicial opinions reveal that federal and state courts have used a ‘scalpel’ and a ‘meat axe’ in carving out guidelines for the inevitable discovery rule[]”; and that “there is a split of authority among federal and state courts on the requirements for establishing the inevitable discovery rule”).

¹⁶² See *supra* note 76 (arguing that, in the haste of the court of appeals in *Ammons* to reject the inevitable discovery exception as a matter of Indiana constitutional law, the court misunderstood the basic logic underlying the inevitable discovery exception that “[t]he illegality is not the cause of discovery at all, for ‘[c]onduct is not a legal cause of an event if the event would have occurred without it[]’”, and also arguing that the court failed to recognize that the inevitable discovery exception is wholly consistent with the Indiana Supreme Court’s recitation of the general rule that evidence obtained *as the result* of an unreasonable search must be suppressed). See also *Brown v. State*, 653 N.E.2d 77, 80 (Ind. 1995).

¹⁶³ See *infra* Part IV.A (explaining the logic of the inevitable discovery exception and proposing a logical formulation to be applied by Indiana courts).

¹⁶⁴ See *infra* Part IV.B (applying the proposed formulation to the facts of *United States v. Holland* described in Part I of this Note).

¹⁶⁵ See Cohn, *supra* note 49, at 750 (arguing that “[i]n any case in which the inevitable discovery rule is applicable, the court must examine thoroughly the facts of the case before the rule is introduced, in order to determine if the evidence indeed would have been discovered regardless of the police’s misconduct.”).

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police would inevitably have discovered the challenged evidence.¹⁶⁶ In such instances, the inevitable discovery exception exclusively serves as an illegitimate abrogation of the exclusionary rule.¹⁶⁷ The proposed formulation reformulates the inevitable discovery doctrine, as adopted by the Supreme Court in *Nix*, so as to remedy these shortcomings and to provide a systematic process through which Indiana courts should apply the inevitable discovery doctrine.¹⁶⁸

The guidelines set forth by the Supreme Court in *Nix*, and by many states since *Nix*, are inconsistent and often fail to delineate the proper contours of the inevitable discovery exception.¹⁶⁹ Specifically, in many jurisdictions, the government's burden of proof is too relaxed;¹⁷⁰ the good or bad faith of the offending officer is inappropriately held to be dispositive;¹⁷¹ the exception is applied where the government merely *could* have, rather than *would* have, discovered the evidence by lawful means;¹⁷² and application of the exception is unnecessarily restricted

¹⁶⁶ See Cohn, *supra* note 49, at 750 (arguing that "[a] spotty and imprecise treatment of the facts[] . . . leads to a mechanical application of the rule and detracts from the logic that determines its validity[]").

¹⁶⁷ See Webb, *supra* note 51, at 1003 (arguing that the "warm embrace of such an impermissibly designed interference with sixth amendment rights is an abomination to the integrity of our judicial system.").

¹⁶⁸ See generally *infra* Part IV (proposing a logical formulation of the inevitable discovery doctrine and applying the proposed formulation to the facts of *United States v. Holland* as described in Part I of this Note).

¹⁶⁹ See *supra* note 59 (explaining that despite the scholarly debate, however, the inevitable discovery exception can and should be formulated so that it meets the concerns expressed by critics of the exception).

¹⁷⁰ See generally Part III.A (explaining that proof by a preponderance of the evidence is inadequate to prove that the discovery of evidence was truly inevitable and arguing that the standard of proof by clear and convincing evidence is necessary in inevitable discovery cases).

¹⁷¹ See generally note 53 (explaining that proof of inevitable discovery by lawful means and without reference to the unlawful conduct severs the causal link between the unlawful conduct and the discovery of the evidence and, therefore, that the mens rea of the offending officer is wholly irrelevant in inevitable discovery cases). See also *Nix v. Williams*, 467 U.S. 431, 456 (1984) (explaining that "[a]dmission of the victim's body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of [the detective] . . . is therefore simply irrelevant[]"). See also *supra* note 67 (explaining that if the State carries the burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant).

¹⁷² See generally note 63 (explaining that proof that the police *could* have obtained the challenged evidence by lawful means is completely inadequate in inevitable discovery cases; rather, arguing that the State must show that the police *would* have utilized proper procedures in the case at issue and that such procedures would inevitably have led to the lawful discovery of the challenged evidence).

only to derivative evidence.¹⁷³ Although courts have articulated specific factors to be considered in inevitable discovery cases, such formulations of the exception often have lost sight of, and are incongruous with, the sound rationale upon which the exception is based.¹⁷⁴

A. Logical Formulation of the Inevitable Discovery Doctrine

The proposed formulation of the inevitable discovery doctrine, which would apply to Indiana courts, provides a two-step test that Indiana judges should apply when determining whether the inevitable discovery exception may properly be applied to a particular set of facts. This approach, which expands upon the basic, but inadequate, guidelines enunciated by the Supreme Court in *Nix*, sets forth a test by which courts, consistent with public policy and the important goals of the exclusionary rule, should analyze the facts in inevitable discovery cases. Unlike the Supreme Court's deferential approach to inevitable discovery,¹⁷⁵ the proposed formulation, through the reformulation of the guidelines provided in *Nix*, ensures that the inevitable discovery exception will only be applied in appropriate cases by requiring courts to examine thoroughly the facts of the case under a heightened standard of proof, in order to determine if the evidence indeed would have been discovered regardless of any police misconduct.

The proposed formulation of the inevitable discovery doctrine is as follows: when the prosecution can show, by clear and convincing evidence, that illegally obtained evidence inevitably *would* have been discovered without reference to the unlawful police conduct, through lawful and predictable investigative processes that *would* have been

¹⁷³ See generally Part II.C (explaining that any distinction between primary and derivative evidence in inevitable discovery cases is unnecessary and inappropriate because the decisive issue in inevitable discovery cases is not the type of evidence, but whether the evidence indeed would inevitably have been discovered by lawful means and without reference to the prior illegality).

¹⁷⁴ See LAFAYE, *supra* note 48, at 243–44 (observing that the arguments of critics of the inevitable discovery doctrine “are directed not so much to the rule itself as to its application in a loose and unthinking fashion” and suggesting that courts must take care to ensure that the inevitable discovery exception is only applied in appropriate cases).

¹⁷⁵ See Webb, *supra* note 51, at 1003 (passionately arguing that, although the inevitable discovery exception may be appropriate in some cases, the Court's adoption of a lesser standard of proof by a preponderance of the evidence amounted to an encouragement of constitutional violations by police, that “Chief Justice Burger has openly condoned as well as encouraged [constitutional violations]—so much so, in our opinion, as to elevate the high court from the status of a mere ‘accomplice’ to one of ‘co-conspirator’ to such illegal activity,” and concluding that “[t]he Supreme Court's warm embrace of such an impermissibly designed interference with [constitutional] rights is an abomination to the integrity of our judicial system”).

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utilized in the case at bar, the inevitable discovery exception should be available to preserve the challenged evidence, regardless of the good or bad faith of the officer who engaged in the initial police misconduct, and regardless of whether the evidence to be discovered was primary or derivative.

B. Application of the Proposed Formulation of the Inevitable Discovery Exception

The proposed formulation of the inevitable discovery exception delineates the precise circumstances in which the inevitable discovery exception is appropriate and provides a systematic process for the proper determination of whether the exception may correctly be applied to a particular set of facts.¹⁷⁶ By reformulating the basic analytical framework adopted by the Court in *Nix*, the proposed formulation ensures that the exception will not swallow the exclusionary rule.

The proposed formulation's systematic process restricts the scope of the exception so that it may only be applied in cases in which the government has satisfied a heightened burden of proof as to whether the challenged evidence would inevitably have been discovered by lawful means. Moreover, the proposed formulation is consistent with public policy in that it limits application of the exclusionary rule to those cases in which its purposes are most efficaciously served: where police misconduct is, in fact, the legal cause of the discovery of the challenged evidence. Where police misconduct is not the legal cause of discovery, blind adherence to the exclusionary rule is not only unwise and improper, it wholly fails to take into account the enormous societal cost of excluding truth in the administration of justice.¹⁷⁷

By applying the proposed formulation to the facts of *Holland* described in Part I, the necessity for the adoption of the formulation can best be illustrated. Ordinarily, the exclusionary rule would require the exclusion of evidence of the murder victim's body obtained as a result of the unlawful search of Holland's garage by the offending patrol officers.¹⁷⁸ However, application of the inevitable discovery exception,

¹⁷⁶ See generally *supra* Part III and accompanying text (analyzing the strengths and weaknesses of the various formulations of the inevitable discovery doctrine).

¹⁷⁷ See *Nix v. Williams*, 467 U.S. 431, 445 (1984) (explaining that the exclusion of evidence that inevitably would have been discovered without any reference to illegal conduct "wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice[]" and that "[n]othing in [the Supreme] Court's prior holdings supports any such formalistic, pointless, and punitive approach[]").

¹⁷⁸ See *supra* notes 26-27 and accompanying text; see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

as proposed in this Note, provides a much more just result: where the prosecution can show, by clear and convincing evidence, that the body, illegally discovered by the offending patrol officers, *would* have inevitably been discovered by Officer Vaughn without reference to the illegality, through Officer's Vaughn's utilization of the lawful investigative process of executing a search warrant, the inevitable discovery exception will operate to preserve the challenged evidence, regardless of the good or bad faith of the patrol officers who engaged in the initial police misconduct, and regardless of the fact that Amanda's body was primary rather than derivative evidence.

In *Holland*, the evidence clearly and convincingly established that Amanda's body *would* have been discovered by Officer Vaughn through the lawful investigative process of executing a validly issued search warrant.¹⁷⁹ Consequently, because the evidence clearly establishes that Amanda's body *would* lawfully have been discovered notwithstanding the misconduct of the patrol officers, the fundamental premise of the inevitable discovery exception—that illegal police misconduct is not the legal cause of the discovery of evidence if the evidence *would have* inevitably been discovered without the illegality—is satisfied.¹⁸⁰

Additionally, even if the patrol officers who discovered Amanda's body had done so in bad faith with the intent to violate Holland's rights, the inevitable discovery exception is still applicable because the conduct of the offending patrol officers is irrelevant to whether the inevitable discovery exception should be applicable in a particular case.¹⁸¹ Instead, the lawful means through which Officer Vaughn would have discovered Amanda's body, implicit in which was Officer Vaughn's good faith intent, replaced the misconduct as the legal cause of the discovery of Amanda's body.¹⁸²

¹⁷⁹ See generally *supra* Part I (explaining that the evidence showed not that Officer Vaughn *could* have obtained a search warrant that *could* have led to the discovery of Amanda's body, but that Officer Vaughn *had already* obtained a warrant to search Holland's garage and that Officer Vaughn *had already* made arrangements to execute the warrant in short order).

¹⁸⁰ See *supra* note 49 (explaining that the illegality is not the cause of discovery at all in inevitable discovery cases because conduct is not a legal cause of an event if the event would have occurred without the illegality).

¹⁸¹ See *supra* note 53 (explaining that proof of inevitable discovery by lawful means severs any causal connection between the police misconduct and the discovery of the challenged evidence and, thus, it makes no sense to invoke a good or bad faith test because the mens rea of the offending officer is irrelevant to the question of causation).

¹⁸² See, e.g., *State v. Garner*, 331 N.C. 491, 507, 417 S.E.2d 502, 511 (N.C. 1992) (providing an example of a state court decision holding that holding that:

[i]f the State finds itself in any situation where it must prove that the evidence inevitably would have been discovered by other legal, independent means, and it fails to do so, the doctrine is not applied

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Finally, the inevitable discovery exception was properly applied regardless of the fact that the evidence at issue, Amanda's body, was primary rather than derivative.¹⁸³ The evidence in *Holland* clearly showed that, without reference to the unlawful conduct of the patrol officers, Officer Vaughn had obtained and made arrangements to execute a search warrant for Holland's garage.¹⁸⁴ With the proposed requirement of proof that proper investigative procedures *would* have been pursued, the concern that application of the inevitable discovery exception to primary evidence would allow for abuse of the exception in any case in which the police merely *could* have obtained a warrant is eliminated, and any distinction between primary and derivative evidence is rendered completely unnecessary.¹⁸⁵

and the evidence is suppressed. This risk of suppression inherently preserves the deterrence value of the exclusionary rule. Further, if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant

Id. at 507, 417 S.E.2d at 511. See also *Nix v. Williams*, 467 U.S. 431, 456 (1984). Justice Stevens, concurring with the majority in *Nix*, also rejected any requirement of proof of the absence of bad faith on the part of the offending officer, explaining:

Admission of the victim's body, if it inevitably would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of [the detective] is therefore simply irrelevant. If the trial process was not tainted as a result of his conduct, this defendant received the type of trial that the *Sixth Amendment* envisions.

Id.

¹⁸³ See generally *supra* Part III.C (explaining that any distinction between primary and derivative evidence in inevitable discovery cases is unwarranted and inappropriate because application of the exception does not depend on the type of evidence at issue but, rather, the decisive factor is whether the challenged evidence indeed would have been discovered by lawful means and without reference to any unlawful police conduct).

¹⁸⁴ See generally *supra* Part I and accompanying text (describing the facts of *United States v. Holland*, 2003 U.S. Dist. LEXIS 14090 (W.D. TN 2003), and providing an excellent example of a case in which the inevitable discovery exception was correctly held to be applicable to primary evidence).

¹⁸⁵ See *supra* notes 136-38 and accompanying text (observing that the "one size fits all" approach taken by courts that have required the exclusion of primary evidence in inevitable discovery cases fails to give any consideration to cases such as *Holland*, in which primary evidence truly would have been discovered by lawful means and for which the inevitable discovery exception is completely appropriate). See also generally Part III.C (explaining that courts that have refused to apply the inevitable discovery exception to primary evidence fail to recognize that the decisive factor in determining whether the inevitable discovery exception should apply to certain evidence is not whether the evidence is primary or derivative but, rather, whether the evidence truly *would* have inevitably been discovered by lawful means).

As illustrated by the facts in *Holland*, the inevitable discovery exception is a valuable and necessary exception to the exclusionary rule.¹⁸⁶ Although the Supreme Court's decision in *Nix* laid the groundwork for the inevitable discovery exception, the guidelines provided by the Court are inadequate to ensure the proper application of the exception. Thus, the proposed formulation reformulates the inevitable discovery doctrine, as adopted by the Supreme Court in *Nix*, so as to remedy these shortcomings and to provide a systematic process through which courts, consistent with the spirit of the exclusionary rule, should apply the inevitable discovery doctrine.

V. CONCLUSION

Although the states have not been uniform in their treatment of the inevitable discovery doctrine, states have nearly universally accepted the doctrine as a legitimate and necessary exception to the exclusionary rule that can and should be formulated so that it may conform to the respective state's constitution. However, rejecting the reasoning of virtually every court to consider the issue and without engaging in any significant analysis, the Indiana Court of Appeals, in *Ammons*, categorically rejected the inevitable discovery doctrine as a matter of Indiana constitutional law. In an effort to correct the anomalous decision in *Ammons*, this Note proposes a sound and logical formulation of the inevitable discovery doctrine that remains true to the fundamental logic upon which the validity of the doctrine depends and which appropriately should be applied by Indiana judges in inevitable discovery cases.

The first step in the proposed formulation requires the state to prove by clear and convincing evidence that unlawfully obtained evidence *would* have inevitably been discovered by lawful means. This step was satisfied in *Holland*, discussed in Part I, as the state clearly and convincingly proved that Officer Vaughn would have discovered the murder victim's body, in short order, through the execution of a validly issued warrant and without reference to the illegal conduct of the patrol officers.

The second step in the proposed formulation was also satisfied in *Holland*, as the state clearly and convincingly proved that proper and predictable investigative processes *would* have been utilized in the case in question and that such procedures *would* inevitably have led to the lawful discovery of the challenged evidence. The evidence in *Holland*

¹⁸⁶ See generally *supra* Part I (providing an excellent example of a case in which the inevitable discovery exception was properly applied).

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was clear that Officer Vaughn did obtain a search warrant and that, pursuant to that warrant, he would inevitably have lawfully discovered the murder victim's body. Thus, as steps one and two were satisfied by the state in *Holland*, the court properly held that the inevitable discovery exception was applicable.

Any dispute as to whether the patrol officers acted in bad faith to violate Holland's constitutional rights, and the fact that the challenged evidence—the murder victim's body—was primary rather than derivative, is immaterial to the inevitable discovery analysis. The decisive issue in inevitable discovery cases, as set forth in the two steps of the proposed formulation, is whether clear and convincing evidence exists that the challenged evidence would lawfully have been discovered without reference to any prior police misconduct. Once this standard has been satisfied, the inquiry ends because, in that instance, any causal link between the unlawful police conduct and the discovery of the evidence is severed.

When properly administered, the inevitable discovery exception is a logical principle that necessarily must be applied to protect against the enormous societal cost of inappropriately withholding reliable evidence from truth-seeking jurors and to prevent the gifting of a windfall upon very fortunate, but undeserving, defendants. Nevertheless, until the Indiana Supreme Court corrects the anomaly created by the unprecedented decision of the Indiana Court of Appeals in *Ammons* and adopts the inevitable discovery doctrine as a constitutional exception to the exclusionary rule as a matter of Indiana constitutional law, Indiana will continue as the exception to an almost universally accepted rule.

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